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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MITSUBISHI INTERNATIONAL CORPORATION,
Petitioner,

v.

CARDINAL TEXTILE SALES, INC., *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY B. DYK
(Counsel of Record)
BARBARA McDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

DOROTHY Y. KIRKLEY
JONES, DAY, REAVIS & POGUE
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 521-3939

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether federal district courts have the authority under Rule 65 of the Federal Rules of Civil Procedure and the All Writs Act, 28 U.S.C. § 1651, to issue preliminary injunctions freezing defendants' assets in order to protect a future money judgment.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals were plaintiff/appellant Mitsubishi International Corporation and defendants/appellees Charles W. Jones, Robert E. Lee, Cardinal Textile Sales, Inc., United General Marketing, Inc., Classic Sales, General Sales & Leasing Co., Consolidated Trading Company, William J. Purvis, William L. Sikkelee, Purvis-Sikkelee International, Ltd. and Skein Dyers of America, Inc. The Court of Appeals granted Mitsubishi's motion to dismiss its appeals as to defendants/appellees Fibertex Textile Supplies, Inc. and Hershel Nunley.

Additional defendants in the district court were Joseph L. Smith, Sun-Fibres, Inc., Raymond B. Lippincott, Mary Ellen Lee, Ellen M. Lee, Donna Parsons Jones, Hunter Transport Company, Roy M. Hunter and ConAgra, Inc. d/b/a Tennessee Cold & Dry Storage.

Pursuant to Supreme Court Rule 29.1, the following list identifies all subsidiaries (except wholly owned subsidiaries) and affiliates of petitioner Mitsubishi International Corporation: ACC Holdings (Aristech); ACLO Compounders, Inc.; AMA Glass Corp.; ATR Wire & Cable Co.; Astronet Corp.; Atlanta Precision Molding Co.; Betachem, Inc.; CT South, Inc.; Coilplus Holdings, Inc.; Coilplus-Alabama; Coilplus-Illinois; Coilplus-Ohio; Creative Image Assocs., Inc.; DPI Marketing, Inc.; Design Process, Inc.; Dexel, Inc.; Diamond Corona, Inc.; Diamond Insurance; Diamond Logistics; Diamond Plastics Corp.; Enkei America, Inc.; Evergreen Investment; Hishi Plastics, USA; Indiana Packers Co.; Japan Aircraft Maintenance; KR Corporation; Kobe Copper Products, Inc.; Kux Manufacturing; MC Aluminum America (MCAA); MC Fabrication; MC Machinery Systems; MC Snack, Inc.; MC Steel Operations; MIC Consulting; MIC Real Estate; MMM Auto Engineering Canada; Manhattan Chemical, Inc.; Mical Specialty Chemicals, Inc.; Mitsubishi Acceptance Corp.; Machinery Distribution,

Inc.; Mitsubishi Engine, N.A. (MENA); Mitsubishi Foods, Inc. (MFI); Mitsubishi International Warehouse Co.; Mitsubishi Motor Sales (MMSA); Mitsubishi Pulp Sales, Inc.; Non Ferrous International Corp. (NFI); North Castle Leisure Enterprises; Petro Diamond Inc. (PDI); Photonic Integration Research; Precision Coil Processing; Premiere Edible Oil Corp.; Project Services, Inc.; Rimtec Corp.; Sanken USA; Skyedale Corporation; Southland Box Co.; Stage Door Productions, Inc.; Steve Baker & Associates; Texas Paris Cogen, Inc.; Triland Metals, USA; Washington Inv. & Development; and YK Property. The parent of petitioner Mitsubishi International Corporation is Mitsubishi Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Mitsubishi International Corporation ("Mitsubishi") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 14 F.3d 1507. It is reprinted at pages 1a-38a of the appendix to this petition. The relevant orders of the district court are unreported. These decisions are reprinted at pages 39a-89a of the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1994. A timely petition for rehearing with a suggestion for rehearing en banc was denied on April 28, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Federal Rule of Civil Procedure 65

(a) Preliminary Injunction.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

* * * *

(d) Form and Scope of Injunction or Restraining Order. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

STATEMENT

This case presents the question whether a federal district court has the authority under Rule 65 of the Federal Rules of Civil Procedure and the All Writs Act, 28 U.S.C. § 1651 (1988), to issue a preliminary injunction to prevent a defendant from dissipating assets that may be required to satisfy a future money judgment. The Court of Appeals for the Eleventh Circuit answered the question in the negative, while recognizing that other federal Courts of Appeals had reached a contrary conclusion. Justice Kennedy has stayed the Eleventh Circuit's mandate pending the disposition of this petition for certiorari.

This case arises out of a two-year conspiracy among a number of individuals and their corporations that, according to the district court, defrauded Mitsubishi of more than $50 million through phony purchases and sales of carpet yarn and fiber. App. 60a.

The "key architects" of the scheme were respondents Charles Jones ("Jones") and the three companies that he owned and controlled;[1] respondents Robert E. Lee ("Lee") and the two companies that he owned and controlled;[2] Joseph Smith and his company, Sun-Fibres, Inc.; and Raymond Lippincott and Mary Ellen Lee, the managers of Mitsubishi's Textile Trading Department in Atlanta ("the Mitsubishi employee defendants"). App. 65a, 45a-46a.[3] Among the other participants in the scheme were

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[1] The companies owned and controlled by Charles Jones are respondents Cardinal Textile Sales, Inc., Consolidated Trading Company and United General Marketing, Inc.

[2] The companies owned and controlled by Robert Lee are respondents General Sales & Leasing Company and Classic Sales.

[3] Raymond Lippincott, Mary Ellen Lee, Joseph Smith and Sun-Fibres are not respondents in this Court.

respondents William J. Purvis and William Sikkelee and their two affiliated companies. App. 40a n.3.[4]

The conspiracy was carried out through "a circular series" of phony purchases and phony sales of carpet yarn. App. 5a. The Mitsubishi employee defendants caused Mitsubishi to issue purchase orders for the yarn to Sun-Fibres. App. 5a. They then caused Mitsubishi to immediately invoice the same yarn to one of the companies owned by respondents Jones and Lee. App. 5a. Almost 2,000 phony transactions occurred in this manner.

Although a small amount of yarn was actually bought and sold in the early transactions, 93% of the yarn was nonexistent. App. 46a. To provide an appearance of legitimacy for the scheme, the conspirators employed a trucking company to haul the yarn, paid a warehousing facility to prepare false bills of lading, and set up multiple companies to masquerade as buyers and sellers of the yarn. App. 50a-52a.

Mitsubishi alone was unaware that the yarn that it was ostensibly buying and selling did not actually exist. App. 44a-46a. Mitsubishi was also unaware that its immediate buyers—respondents Jones, Lee and their affiliated companies—were not paying for much of the yarn that they supposedly purchased from Mitsubishi. App. 6a n.7, 54a. The Mitsubishi employee defendants, who received $7 million in kickbacks in the scheme, manipulated the company's books and records to conceal the $38 million that these respondents owed Mitsubishi. App. 53a-55a.

Mitsubishi paid out more than $178 million to buy the yarn, but received only $136 million back on its sales of the yarn. App. 60a-61a. As a result of this carpet yarn scheme, together with other schemes perpetrated by

[4] The companies controlled by William Purvis and William Sikkelee are respondents Purvis-Sikkelee International, Ltd., and Skein Dyers of America, Inc.

the conspirators involving industrial yarn and Kevlar aramid fiber, Mitsubishi suffered a total out-of-pocket cash loss of more than $50 million. App. 60a.

The district court found that "[m]uch of this money has not been permanently 'retained' by the defendants but instead has been spent or sometimes invested in assets." App. 61a n.17, 62a-63a. In its initial efforts to trace the money retained by the defendants, Mitsubishi established that the defendants had used some of the money for personal living expenses, and some to buy "automobiles, jewelry, antiques, houses, and other real and personal property." App. 61a-63a.

The Mitsubishi employee defendants and Joseph Smith of Sun-Fibres have since pleaded guilty to federal mail fraud, wire fraud and conspiracy charges arising out of these schemes. App. 64a.

On July 3, 1991, Mitsubishi brought this action in the United States District Court for the Northern District of Georgia, asserting claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (1988), and state law. App. 7a-8a. Mitsubishi simultaneously moved the district court for a temporary restraining order and preliminary injunction, which sought to prevent the defendants from dissipating assets during the course of the litigation.

After conducting an initial hearing on Mitsubishi's claims, the district court issued a temporary restraining order. App. 87a. The court concluded that Mitsubishi had "a substantial likelihood of prevailing on the merits of one or more of its claims against Defendants," that Mitsubishi would suffer "immediate and irreparable injury" absent the order, and that "the threat and injury to Plaintiff substantially outweigh any threat and harm the injunctive relief may do the Defendants." App. 87a-88a. The court ordered the defendants not to dissipate or dispose of "any and all monies received, directly or indirectly, as a result of yarn or fiber transactions involving Mitsu-

bishi or Mitsubishi funds" and "any and all real or personal properties purchased in whole or in part with such monies." App. 88a.

Mitsubishi then sought to discover which of the defendants' assets were attributable to the yarn and fiber transactions, and thus were subject to the restraining order. However, respondents Jones and Lee refused to respond to Mitsubishi's inquiries, invoking their Fifth Amendment privilege against self-incrimination. App. 63a-64a. Mitsubishi moved the district court to appoint a receiver to locate and preserve the assets of these respondents and their five affiliated companies. On August 21, 1991, after a two-day hearing, the court agreed to appoint a receiver. App. 80a-81a.

As part of the receivership order, the district court, over Mitsubishi's objection, permitted respondents Jones, Lee and their affiliated companies to use their otherwise frozen assets to pay "reasonable counsel fees and expenses." App. 85a. Mitsubishi took an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) (1988) in order to challenge the district court's orders with respect to the payment of attorneys' fees.

On October 1, 1991, the district court entered a similar attorneys' fees order with respect to respondents Purvis, Sikkelee and their two affiliated companies. App. 78a. Mitsubishi's interlocutory appeal from this order was consolidated with the appeal from the earlier order. App. 11a.

While Mitsubishi's appeal was pending, a number of defendants consented either to preliminary injunctions freezing their assets or to consent judgments. App. 40a & n.4. The district court then conducted a six-day hearing to consider whether similar injunctions should issue against other defendants.

In a 52-page order setting forth its findings of fact and conclusions of law, the court held that Mitsubishi had demonstrated a "substantial likelihood" of prevailing on its claims based on the defendants' fraud and conspiracy

to defraud, and that Mitsubishi would be "irreparably injured" if the defendants were not "restrained from dissipating, concealing, or otherwise transferring money rightfully belonging to Mitsubishi." App. 66a-67a, 70a. The court found that the defendants had caused Mitsubishi an out-of-pocket cash loss of more than $50 million; that the defendants had "engaged in artifices and deceits designed to conceal misappropriated funds rightfully belonging to Mitsubishi"; and that the defendants had already "dissipated Mitsubishi's funds" to the extent of many millions of dollars. App. 60a, 70a. For example, the court found that, while respondents Jones, Lee and their affiliated companies had received "over $20 million" of Mitsubishi's money, they had total assets remaining of only about $16 million by June 1992. App. 62a.

Accordingly, the court enjoined the defendants from "dissipating, transferring, pledging, encumbering, selling, disposing of, or making any other use of any money received either directly or indirectly from Mitsubishi or any property purchased with such money." App. 74a.

A divided panel of the Eleventh Circuit affirmed the orders challenged by Mitsubishi. App. 1a, 4a. Writing for the panel majority, Chief Judge Tjoflat concluded that the district court had not erred in allowing the defendants to use the frozen assets to pay attorneys' fees, because the district court had "no lawful authority" under federal or state law to freeze the assets in the first place. App. 4a.

The panel held that Mitsubishi's only ultimate remedy, whether on its federal RICO claim or its state law claims, would be a money judgment against the defendants. App. 19a-24a. The panel then held that a " 'general federal rule of equity' " prevents district courts from issuing preliminary injunctions to prevent defendants from dissipating assets " 'so that they may be preserved to satisfy a potential money judgment.' " App. 26a (quoting *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988)). The panel viewed this federal equitable rule as deriving from this Court's decision in *De Beers Consolidated Mines*

Ltd. v. United States, 325 U.S. 212 (1945). App. 27a, 29a-30a.

The panel reasoned that, because the district court lacked federal equitable authority to enjoin the defendants' dissipation of assets, the district court's sole authority to protect a potential money judgment was under Federal Rule 64. App. 26a-27a. Rule 64 allows only such prejudgment remedies as may be "available under the circumstances and in the manner provided by the law of the state in which the district court is held." The panel reasoned that "[w]here the state attachment statute [applicable by way of Rule 64] does not authorize prejudgment attachment in a given case, a district court is not authorized under Rule 65 to attempt to accomplish the same result by issuing a preliminary injunction." App. 27a-28a n.24. The panel acknowledged, however, that "some federal courts have held to the contrary, *see, e.g., Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990)." App. 27a-28a n.24. The panel went on to conclude that, because the defendants' assets could not, in its view, be frozen under the Georgia attachment statute, the assets could not be frozen at all.

In dissent, Judge Carnes disagreed with the panel majority as to whether the only ultimate relief available to Mitsubishi was a money judgment. App. 31a. He reasoned that Mitsubishi would also be entitled to the equitable remedy of a constructive trust—a remedy that the district court indisputably would have the power to protect under Rule 65.[5] He observed that "Mitsubishi's ultimate victory is likely to be an empty one" as a result of the panel's decision, because the defendants had been given "a license to plunder and dissipate what is left" of the moneys taken from Mitsubishi. App. 38a.

Mitsubishi filed a timely petition for rehearing with a suggestion for rehearing en banc. The petition was denied

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[5] Judge Carnes thus did not reach the question whether general federal equitable principles allowed the district court to issue an injunction to protect a purely money judgment.

on April 28, 1994. App. 92a. Mitsubishi then filed a timely motion under Federal Rule of Appellate Procedure 41(b) to stay issuance of the mandate pending application to this Court for a writ of certiorari. Chief Judge Tjoflat denied the motion on May 19, 1994.

Mitsubishi immediately applied for a stay to Justice Kennedy as Circuit Justice for the Eleventh Circuit. Mitsubishi noted that this case satisfied all of this Court's requirements for such stays, including a "reasonable probability" that the Court will grant certiorari and a "fair prospect" that the Court will reverse. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, Circuit Justice); *see also Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, Circuit Justice).

On May 20, 1994, Justice Kennedy issued an order directing that the Eleventh Circuit's mandate be "recalled and stayed pending the receipt of a response and further order of the undersigned or of the Court." App. 94a. On June 1, 1994, "[u]pon further consideration of the application of counsel for the petitioner, the response, and the reply filed thereto," Justice Kennedy continued the stay of the Eleventh Circuit's mandate pending this Court's disposition of Mitsubishi's petition for certiorari. App. 93a.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of federal law: Whether a district court has the authority under Federal Rule 65 and the All Writs Act to enjoin a defendant from dissipating assets that may be required to satisfy a future money judgment. Or, as the Third Circuit put it in a similar case, whether "a federal court is powerless to protect a potential future damages remedy against a recalcitrant defendant with highly liquid assets, no matter how wrongful its conduct, how bad the injury it caused, or how brazen its attempt to evade judgment by secreting assets." *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 194 (3d Cir. 1990). The court below

resolved this question in a manner inconsistent with the decisions of this Court and at least seven other federal Courts of Appeals.

I. THE COURT OF APPEALS' DECISION IN THIS CASE CONFLICTS WITH TWO APPLICABLE DECISIONS OF THIS COURT

The federal district courts have historically possessed the equitable authority, as a matter of federal law, to preserve the status quo while a case is being adjudicated. This Court has recognized that this federal equitable authority allows district courts to issue preliminary injunctions to prevent the dissipation of defendants' assets.

In this respect, the decision below is directly contrary to *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). In that case, the Court upheld a preliminary injunction that prevented a third party, which held the defendant's assets, from transferring the assets during the pendency of a federal securities case. The Court explained that, where a plaintiff demonstrates that the defendant's "assets [are] in danger of dissipation or depletion," such an injunction is "a reasonable measure to preserve the status quo pending final determination" of the case. *Id.* at 290. Otherwise, said the Court, "the legal remedy" against the defendant "would be inadequate." *Id.*

The Eleventh Circuit did not even cite *Deckert* in this case, but instead invoked *De Beers Consolidated Mines Ltd. v. United States*, 325 U.S. 212 (1945), as supporting its more restricted view of district courts' authority under Rule 65. In *De Beers*, decided five years after *Deckert* and in an entirely different context, the Court held that the United States could not obtain a preliminary injunction freezing the defendants' assets, where the *only* final relief that the district court could issue was an injunction against the defendants' future violation of the antitrust and trade laws. *See id.* at 219-20. The Court explained that *De Beers* was not a case, like *Deckert* and

this case, where the preliminary injunction was to secure "a fund or property which would have been the subject of the provisions of any final decree in the cause." *Id.* at 220.

The decision below is also inconsistent with *United States v. First National City Bank*, 379 U.S. 378 (1965), which confirms both the narrowness of the holding in *De Beers* and the broad authority of the federal courts to freeze assets pending a final judgment. In *First National*, the United States sought to foreclose a tax lien against a bank that held assets of a foreign corporation that owed federal income taxes. The Court upheld a preliminary injunction that barred the bank from transferring the foreign corporation's assets, explaining that the injunction was "eminently appropriate to prevent further dissipation of assets." *Id.* at 385. Over the dissent's contention that *De Beers* was "indistinguishable from the present case," *id.* at 397 (Harlan, J., dissenting), the Court held that, unlike in *De Beers*, "there is here property which would be 'the subject of the provisions of any final decree in the cause.' " *Id.* at 385 (quoting *De Beers*, 325 U.S. at 220). Of course, any such final decree, as the Court was reminded by the dissent, "would be a money award." *Id.* at 398 (Harlan, J., dissenting).

Here, as in *Deckert* and *First National*, the district court's preliminary injunction freezing the defendants' assets served to preserve "property which would be 'the subject of the provisions of any final decree in the cause.' " *First National*, 379 U.S. at 385. Indeed, the district court specifically confined its injunction to "money received [by the defendants] either directly or indirectly from Mitsubishi or any property purchased with such money." App. 74a. The decision below is thus in direct conflict with *Deckert* and *First National*.[6]

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[6] Respondents have previously attempted to distinguish the injunctions in *Deckert* and *First National* as having been "based upon authority expressly conferred by federal statute." Respond-

II. THE DECISION BELOW SQUARELY CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

Despite the seeming clarity of this Court's decisions in *Deckert* and *First National*, the Courts of Appeals are seriously divided as to the power of the district courts to freeze defendants' assets pending a final money judgment. The Eleventh Circuit's decision that district courts are without authority under Rule 65 and the All Writs Act to issue preliminary injunctions to protect money judgments conflicts with the decisions of at least seven federal Courts of Appeals. It is consistent with the decisions of three other Courts of Appeals. The conflict among the Circuits is so clear and extensive as to warrant resolution by this Court.

The Eleventh Circuit acknowledged in this case that, with respect to its conclusion that district courts are without authority under Federal Rule 65 to issue preliminary injunctions to protect potential money judgments, "[s]ome federal courts have held to the contrary." App. 27a-28a n.24. The court specifically cited the Third Circuit's decision in *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, as one such contrary holding.

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ents' Brief in Opposition to Application to Stay Mandate (May 27, 1994) at 8. They are wrong. The Court did not rely in either case on any express statutory authority to freeze defendants' assets. Nor could the Court have done so. Neither the Securities Act in *Deckert* nor the tax statute in *First National* conferred any such express authority. Instead, the Court relied in both *Deckert* and *First National* on the same general federal equitable principles that are invoked here. Other Courts of Appeals have recognized that the principles of *Deckert* and *First National* apply to cases in which district courts are adjudicating solely state law claims. *E.g., Hughes Network Systems, Inc. v. Interdigital Communications Corp.*, 17 F.3d 691 (4th Cir. 1994); *Gerardi v. Pelullo*, 16 F.3d 1363 (3d Cir. 1994); *Unisys Corp. v. Dataware Prods., Inc.*, 848 F.2d 311 (1st Cir. 1988).

The Eleventh Circuit again recognized this conflict among the federal Courts of Appeals in *Rosen v. Cascade International, Inc.*, 1994 U.S. App. LEXIS 7143, at *19-29 (11th Cir. Apr. 11, 1994) (No. 92-4999), which was decided after this case and authored by the same circuit judge. In *Rosen*, the Eleventh Circuit observed that its position conflicted not only with the Third Circuit's decision in *Hoxworth* but also with the First Circuit's decision in *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 52 (1st Cir. 1986). At the same time, the court again noted that its position is consistent with the Fifth Circuit's decision in *In re Fredeman Litigation*, 843 F.2d 821, 824-28 (5th Cir. 1988). *See also Hoxworth*, 903 F.2d at 195 (noting conflict between *Fredeman* and *Teradyne* on this issue).

While not specifically noted in the Eleventh Circuit's decisions, at least five other Circuits, in addition to the First and Third Circuits, have held that district courts may, in appropriate circumstances, enjoin a defendant from dissipating assets in order to secure a future money judgment. *See, e.g., Hughes Network Systems, Inc. v. Interdigital Communications Corp.*, 17 F.3d 691, 694, 696 (4th Cir. 1994); *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327, 1330 (4th Cir. 1989); *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220, 1226-27 (8th Cir. 1987); *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986); *In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985); *Foltz v. U.S. News & World Report*, 760 F.2d 1300, 1309 (D.C. Cir. 1985); *see also Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 386 (7th Cir. 1984) (explaining that a plaintiff may suffer irreparable harm sufficient to justify a preliminary injunction even "[w]here the only remedy sought at trial is damages").

In contrast, the Sixth and Ninth Circuits have adopted positions closer to those of the Fifth and Eleventh Circuits. *See, e.g., USACO Coal Co. v. Carbomin Energy,*

Inc., 689 F.2d 94, 97-98 (6th Cir. 1982) (district court may issue a preliminary injunction freezing defendants' assets to protect an equitable remedy but not "to secure a RICO treble damages award"); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982) (district court may issue a preliminary injunction freezing assets under Rule 65 only "to protect the possibility of [an] equitable remedy"). The Third Circuit has viewed these cases as embracing the position that "a preliminary injunction can never issue to protect a damages remedy." *Hoxworth*, 903 F.2d at 195 n.14.

Almost all of the federal Courts of Appeals have thus confronted the question whether district courts have the authority under Rule 65 and the All Writs Act to freeze defendants' assets in cases seeking money judgments. These courts have taken squarely conflicting positions on the question. This conflict cannot be expected to resolve itself. While the Eleventh Circuit in *Rosen* persisted in the position that district courts have no authority to freeze defendants' assets, the First and Third Circuits have continued to reaffirm their contrary holdings in *Teradyne* and *Hoxworth*. *See, e.g., Gerardi v. Pelullo*, 16 F.3d 1363, 1373 (3d Cir. 1994) (citing *Hoxworth*); *Unisys Corp. v. Dataware Prods., Inc.*, 848 F.2d 311, 314 (1st Cir. 1988) (citing *Teradyne*). The time is ripe, therefore, for this Court's intervention.

III. THIS CASE PRESENTS AN IMPORTANT AND RECURRING ISSUE OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT

The district courts' authority to enjoin defendants from dissipating assets that may be required to satisfy a potential money judgment is a question of great practical importance.

This question arises with considerable frequency in the lower federal courts. Nearly every federal Court of Ap-

peals has confronted the question at least once since 1982. It has already this year been addressed twice by the Eleventh Circuit, in this case and later in *Rosen*, 1994 U.S. App. LEXIS 7143, and twice by other federal Courts of Appeals, *see Hughes Network Systems*, 17 F.3d at 694; *Gerardi*, 16 F.3d at 1373-74. The issue has also engaged the academic commentators. *See, e.g.*, Rhonda Wasserman, *Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments*, 67 Wash. L. Rev. 257 (1992).

The cases in which the question arises are themselves important ones. They often concern allegations of serious wrongdoing—including, as in this case, violations of federal criminal law, *see, e.g., Fredeman*, 843 F.2d at 822-23; *Airlines Reporting Corp.*, 825 F.2d at 1222 n.3—that may have cost millions of dollars to businesses, investors and consumers. The cases present many complex factual and legal issues that may require some years to be finally resolved at the trial and appellate levels. A significant threat exists in such cases that, when the time finally comes for a defendant to pay a money judgment, he will no longer have sufficient resources to satisfy that judgment. The Fifth and Eleventh Circuit's "federal rule of equity," App. 26a (quoting *Fredeman*, 843 F.2d at 824), against preliminary injunctions to secure money judgments can produce serious inequity in such circumstances.

If a district court's sole means of protecting a potential money judgment is under Federal Rule 64, which allows only such prejudgment relief as may be available under the forum state's attachment statute, then the authority of the federal courts will be severely restricted. Narrowly drafted and readily circumvented, state attachment statutes are, at best, of "limited utility" in securing money judgments. *See* Wasserman, *supra*, 67 Wash. L. Rev. at 276-80. Indeed, while the Eleventh Circuit held both here and in *Rosen* that the plaintiffs' only prejudgment

remedy was under the forum state's attachment statute, the court went on to hold in both cases that the relevant statute would not permit attachment. *See* App. 28a-29a; *Rosen*, 1994 U.S. App. LEXIS 7143, at *33-34. In these and many other cases, therefore, the Eleventh Circuit's rule cannot assure that, after a plaintiff has devoted years to successfully litigating a case to a final judgment for money damages, the defendant will not have already dissipated the assets necessary to satisfy the judgment.

Finally, although the district courts' authority to issue preliminary injunctions freezing defendants' assets has been frequently litigated in recent years, none of those cases has reached this Court. That is presumably because the issue, which is necessarily decided when the case is in an interlocutory posture, is "effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *see also Swift & Co. Packers v. Compania Columbiana del Caribe*, 339 U.S. 684, 689 (1950) (appellate review of an order dissolving a prejudgment attachment of a ship "would be an empty rite" if deferred until final judgment "after the vessel had been released and the restoration of the attachment only theoretically possible"). Accordingly, if the Court does not take the opportunity in this case to resolve the conflict among the Circuits on this important question of federal law, the Court may not soon have another opportunity to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY B. DYK
(Counsel of Record)
BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

DOROTHY Y. KIRKLEY
JONES, DAY, REAVIS & POGUE
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 521-3939
Counsel for Petitioner

June 1994

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 91-8775, 91-8900

D.C. Docket No. 1:91-cv-1510-MHS

MITSUBISHI INTERNATIONAL CORPORATION,
Plaintiff-Counterclaim-Defendant-Appellant,

versus

CARDINAL TEXTILE SALES, INC.;
UNITED GENERAL MARKETING, INC.,
CLASSIC SALES, INC.,
CHARLES W. JONES and ROBERT E. LEE,
Defendants-Crossclaim-Plaintiffs-Appellees,

GENERAL SALES & LEASING CO.,
Defendant-Counterclaim-Plaintiff-Crossclaim-Plaintiff-Appellee,

FIBERTEX TEXTILE SUPPLIES, INC.,
Defendant-Crossclaim-Defendant-Crossclaim-Plaintiff,

PURVIS-SIKKELEE INTERNATIONAL, LTD.
and SKEIN DYERS OF AMERICA, INC.,
Defendants-Crossclaim-Defendants-Appellees,

RAYMOND B. LIPPINCOTT, III, *et al.*,
Defendants,

WILLIAM J. PURVIS, WILLIAM L. SIKKELEE
and CONSOLIDATED TRADING CO.,
Defendants-Appellees,

JOSEPH LEE SMITH, *et al.*,
Defendants-Crossclaim-
Defendants,

HERSHEL NUNLEY, *et al.*,
Defendants-Crossclaim-
Plaintiffs,

UNITED STATES OF AMERICA,
Movants.

No. 92-8192

D.C. Docket No. 1:91-cv-1510-MHS

MITSUBISHI INTERNATIONAL CORPORATION,
Plaintiff-Counterclaim-
Defendant-Appellant,

versus

CARDINAL TEXTILE SALES, INC., *et al.*,
Defendants-Crossclaim-
Plaintiffs,

GENERAL SALES & LEASING CO.,
Defendant-Counterclaim-
Plaintiff-Crossclaim-
Plaintiff,

FIBERTEX TEXTILE SUPPLIES, INC.,
Defendant-Crossclaim-Defendant-Crossclaim-Plaintiff,

PURVIS-SIKKELEE INTERNATIONAL, LTD. and SKEIN DYERS OF AMERICA, INC.,
Defendants-Crossclaim-Defendants-Appellees,

RAYMOND B. LIPPINCOTT, *et al.*,
Defendants,

WILLIAM J. PURVIS and WILLIAM L. SIKKELEE,
Defendants-Appellees,

HERSHEL NUNLEY, *et al.*,
Defendants-Crossclaim-Plaintiff,

UNITED STATES OF AMERICA, *et al.*,
Movants.

Appeals from the United States District Court for the Northern District of Georgia

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(February 9, 1994)

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and JOHNSON, Senior Circuit Judge.

TJOFLAT, Chief Judge:

This action for money damages is presently pending in the district court.[1] In order to ensure that the plain-

[1] The plaintiff has invoked the court's federal question jurisdiction, 28 U.S.C. § 1331 (1988), by presenting a claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964 (1988). The plaintiff also presents several pendent claims under state law.

tiff will be able to satisfy any money judgment that it might ultimately obtain in this litigation, the district court, on the plaintiff's application for preliminary injunctive relief, imposed a constructive trust upon the assets of the defendants. The court also appointed a receiver to manage the assets of two groups of defendants.

The appeals before us, which we have consolidated for decision, are from orders of the district court modifying the constructive trust to permit some of the defendants to pay their lawyers for representation in this litigation. The plaintiff contends that the district court abused its discretion in allowing such payments from assets subject to the trust. Because we conclude that the district court had no lawful authority to impose the constructive trust or otherwise to attach the defendants' assets—and thus to prevent the defendants from using their assets to pay counsel—we affirm.

I.

A.

This case arises out of a series of transactions involving carpet yarn that began in 1989.[2] The transactions were structured by a small circle of individuals: Joseph L. Smith, the owner of Sun-Fibres, Inc. ("SFI"); Charles W. Jones and Robert E. Lee, the owners and operators of Cardinal Textile Sales, Inc. ("Cardinal") and General Sales & Leasing Co. ("General"), respectively; and two

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[2] The facts we relate are drawn from the pleadings, affidavits, and transcripts of evidentiary hearings and depositions contained in the record on appeal; of course, our description of the facts is not binding on the district court as the actual facts will be established later at trial. Thus, "what we state as 'facts' in this opinion for purposes of reviewing the [challenged] rulings . . . may not be the actual facts. They are, however, the facts for present purposes, and we set them out below." *Swint v. City of Wadley*, 5 F.3d 1435, 1439 (11th Cir. 1993). It should be noted that the district court has consistently credited Mitsubishi's version of events. We do likewise.

employees of Mitsubishi International Corporation ("Mitsubishi"), Raymond B. Lippincott, III, and Mary Ellen Lee, who managed the textile trading department in the company's Atlanta branch.

At the outset, the transactions were arranged as follows. Mitsubishi (from its Atlanta, Georgia, office) purchased carpet yarn from SFI and sold it on open account to Cardinal and General, two textile brokerage companies located in Dalton, Georgia.[3] Cardinal and General, in turn, sold the yarn to SFI's supplier, Purvis Sikkelee International, Ltd.[4] Apparently unknown to Mitsubishi management, but with the assistance of Mitsubishi employees Lippincott and Lee, the defendants thus established a circular series of yarn transfers that was repeated numerous times over the ensuing two years.[5]

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[3] Although Smith represented to Mitsubishi that SFI was purchasing the yarn from the E.I. DuPont Company, his suppliers were actually other affiliated textile companies in Dalton—namely, Purvis Sikkelee International, Ltd. and Skein Dyers of America, Inc. (hereinafter, collectively referred to as "PSI").

[4] In this process, the defendants repeatedly shipped the same yarn products while obtaining new funds from Mitsubishi for each transaction; documentation identified new shipments of yarn while the goods were actually the same products that had been recycled between PSI and Cardinal or General. This fact was concealed from Mitsubishi because the yarn was shipped from PSI to a warehouse and then directly to Mitsubishi's customers.

[5] Mitsubishi also contends that, while this series of carpet yarn transactions was in progress, Smith devised a second, subsidiary scheme to defraud Mitsubishi. In what it terms the "Kevlar Scheme," Mitsubishi agreed to purchase a product known as aramid fiber, or Kevlar, from SFI for resale to various defense contractors. Smith represented that SFI purchased the Kevlar from DuPont, whereas the paperwork was in fact entirely fictitious (no Kevlar actually existed). Mitsubishi forwarded money to SFI for the purchase of the textiles but was never paid by its customers because no Kevlar was ever delivered; as in the yarn transactions, Mitsubihsi advanced millions of dollars based upon the defendants' misrepresentations.

Mitsubishi paid SFI for the yarn it purchased through accounts established at Mitsubishi's bank. Payment was made on each transaction when SFI presented the bank with a set of documents, including a Mitsubishi purchase order and a packing list/bill of lading indicating that the yarn had been shipped to Mitsubishi's customer. Meanwhile, as was noted above, Cardinal and General were to pay Mitsubishi for the textiles on open account, the terms of which are not important here. In effect, through this financing arrangement, Mitsubishi extended credit for these transactions to its carpet yarn customers.

In 1990, SFI stopped shipping yarn altogether.[6] The transactions, however, continued on paper; SFI used false bills of lading to obtain payment from Mitsubishi's bank. SFI, Mitsubishi's customers (Cardinal and General), and the other defendants who were participating with them in the scheme all shared in the money made available by Mitsubishi under the financing arrangement established for the yarn transactions. For a time, while the yarn was still being shipped, Cardinal and General paid for some of the textiles.[7] By the time Mitsubishi brought this suit, however, the Cardinal and General accounts with Mitsubishi were several million dollars in arrears.

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[6] At this point, the conspiring defendants phased out the participation of PSI in the operation and began using two companies affiliated with Cardinal and General (United General Marketing, Inc., and Classic Sales) as the "suppliers." Fibertex Textile Supplies, Inc., owned by Hershel Nunley, became involved as an ostensible source of yarn as well.

[7] Lippincott and Ellen Lee, who were paid kick-backs per pound of yarn allegedly shipped by SFI, disguised the nature of these transactions from Mitsubishi management. Cardinal and General did make some token payments to Mitsubishi for their purported yarn purchases in order to induce Mitsubishi to provide more money to finance further textile transactions. But Lippincott and Lee concealed the fact that the purchasers were not paying all of their invoices by manipulating Mitsubishi's in-house accounting systems.

B.

In an attempt to recover the arrearage, Mitsubishi brought this suit on July 3, 1991, in the United States District Court for the Northern District of Georgia against Cardinal, General, CFI, and several other parties whom it alleged had collaborated with those defendants in the scheme described above. As amended, Mitsubishi's complaint states causes of action in contract and tort. The complaint's terminology, however, is somewhat confused because it labels both bases for recovery and alternative remedies as "counts." [8] When examined closely, the complaint presents the following claims for relief: claims against Cardinal and General for breaching their respective promises to pay for the yarn Mitsubishi sold them and for accounts stated; claims against Lippincott and Ellen Lee for breaching their "duty of loyalty" as employees to Mitsubishi; claims against Cardinal and General, and against SFI, for fraud (the allegation being that those defendants fraudulently induced Mitsubishi to sell yarn to Cardinal and General by falsely representing that they would pay for the goods); and claims against all of the defendants under the federal and state RICO statutes based essentially upon such fraudulent misrepresentations.

In addition to these theories of recovery, the complaint also seeks, as equitable remedies but not as independent

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[8] Mitsubishi's amended complaint contains ten counts, including claims for: damages resulting from common law conversion, fraud, and conspiracy to defraud under Georgia state law (counts I-III); damages for breach of a duty of loyalty by Lippincott and Ellen Lee (count IV); the imposition of a constructive trust and equitable lien over the misappropriated monies and property purchased therewith by the defendants (count V); treble damages and injunctive relief under the federal and state RICO statutes (counts VI and VII, respectively); accounts receivable owed by Cardinal, General, Robert Lee, and Jones (count VIII); an equitable accounting under Georgia law (count IX); and the appointment of a receiver over the defendants to protect the assets allegedly misappropriated from Mitsubishi (count X).

grounds of liability, the imposition of a constructive trust, an equitable accounting, and the appointment of a receiver. Taken collectively, the application in the complaint for this equitable relief asks the district court to impose a constructive trust on the defendants' assets so that funds will be available with which to satisfy any money judgment that might ultimately be rendered against one or more of the defendants; the appointment of a receiver would facilitate that process.

On the same day it filed its complaint, Mitsubishi petitioned the district court for a temporary restraining order to protect the assets of the defendants that Mitsubishi alleged it owned by operation of a constructive trust. The district court granted Mitsubishi's motion after a short hearing, concluding that:

> It appears to the Court that Plaintiff Mitsubishi . . . has a substantial likelihood of prevailing on the merits of one or more of its claims against Defendants; that immediate and irreparable injury, loss or damage will result to Plaintiff unless a restraining order is issued against Defendants; that the threat and injury to Plaintiff substantially outweigh any threat and harm the injunctive relief may do the Defendants; and granting injunctive relief will serve the public interest.

The court then froze a significant portion, albeit perhaps not all, of the assets of the defendants in an apparent attempt to ensure that any unlawfully obtained funds would be secured. The temporary restraining order provided as follows:

> [P]ending a hearing on Plaintiff's Motion for Preliminary Injunction, or further Order of the Court, the Defendants . . . are temporarily restrained from dissipating, transferring, pledging, encumbering, selling, disposing of, or making any other use of any and all monies received, directly or indirectly, from

> Joseph L. Smith or [SFI]; any and all monies received, directly or indirectly, as a result of yarn or fiber transactions involving Mitsubishi or Mitsubishi funds; and any and all real or personal properties purchased in whole or in part with such monies. This Order extends to all such monies wherever they may be traced and whether kept separate or commingled with other monies.

The district court's order also required an immediate equitable accounting of the relevant funds and granted Mitsubishi's request for expedited discovery. The temporary restraining order subsequently was extended several times by consent of the parties so that they could prepare for a later preliminary injunction hearing.[9]

On August 6, 1991, Mitsubishi petitioned the court for the immediate appointment of a receiver "to take control, custody and management of the business and

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[9] At oral argument, counsel advised the court that the temporary restraining order (as modified by the attorneys' fee orders challenged here) had been supplanted by a preliminary injunction issued by the district court on October 27, 1992. (We note in passing, *infra* note 14, that the temporary restraining order was itself in the nature of a preliminary injunction.) As represented to us, the 1992 preliminary injunction preserves the controls on the defendants' assets (the constructive trust, the receivership, and the exemptions for attorneys' fees) that are at issue here.

The new order of the district court does not render these appeals moot. Mitsubishi challenges three orders of the district court that allow the appellees to pay counsel fees from their assets that are subject to the constructive trust. We explain in part II, *infra*, that these orders in essence constitute appealable denials of Mitsubishi's requests for more extensive injunctive relief. Although we necessarily discuss the terms of the temporary restraining order and receivership order, which form the backdrop for the controversies at issue here, those asset controls are not directly challenged in these appeals. Accordingly, the fact that a new preliminary injunction has been issued does not affect our inquiry. Each denial of injunctive relief is independently appealable; a subsequent denial of the same request may be appealable in its own right, but it does not affect the merits of an earlier challenge.

assets" of General and Cardinal "for the purposes of preserving the assets of said Defendants, in which Mitsubishi has an equitable interest pursuant to a constructive trust or an equitable lien. . . ." Following a two-day evidentiary hearing held on August 13-14, 1991, the district court granted Mitsubishi's motion on August 22, finding that "plaintiff ha[d] shown a substantial likelihood of prevailing on its claims that assets in the possession or control of defendants . . . should be impressed with a constructive trust in favor of plaintiff, and in order to marshal, protect, and preserve such assets." A receiver was appointed with broad authority to manage the assets and businesses of Cardinal and General under the direction of the court.

These appeals arise out of the district court's decision to allow the appellees to pay their attorneys with funds that had been subjected to the temporary restraining order. On August 9, 1991, before the receiver was appointed, General filed an Application for Allowance of Reasonable Compensation and Disbursements to their counsel for the period commencing with the issuance of the temporary restraining order on July 3. Cardinal filed a similar request several days later. Both petitions asked the district court to modify its temporary restraining order to allow reasonable compensation to counsel for the defendants.

In its August 22 receivership order, the district court granted the requests of Cardinal and General that payment of interim attorneys' fees be allowed from the funds subject to the original temporary restraining order. Over Mitsubishi's objections, the court ordered that "[General and Cardinal] shall be permitted to pay reasonable counsel fees and expenses for their defense of this action," subject to review of the attorneys' invoices by the receiver as well as approval by the court. More importantly, the order purported to preclude Mitsubishi from ever seeking disgorgement of these interim attorneys' fees once they

were paid. The court decreed that "any funds paid to the attorneys for the Receiver Entities pursuant to this order shall be released from any restraint or constructive trust and plaintiff shall not seek to have them disgorged, repaid, or refunded at any time. . . ." [10]

In appeal number 91-8775, Mitsubishi appeals that portion of the receivership order that governs attorneys' fees. Specifically, Mitsubishi appeals the section that "(i) authorizes payment of attorneys' fees to counsel for certain defendants [Cardinal and General], (ii) releases funds paid to these attorneys from 'any restraint or constructive trust,' and (iii) forbids [Mitsubishi] from seeking disgorgement, repayment, or a refund of those released funds at any time." In appeals number 91-8900 and 92-8192, Mitsubishi challenges two virtually identical orders entered on October 1, 1991, and February 14, 1992; these orders preclude Mitsubishi from recovering counsel fees paid by PSI and Fibertex Textile Supplies, respectively. We consolidated all three appeals for decision because each underlying order is identical in substance—awarding interim attorneys' fees and exempt-

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[10] The district court indicated its reasoning behind this portion of the Receivership Order during proceedings in open court on August 19, 1991. The court explained:

> I am going to pay the attorney fees or permit them to be paid out of the particular defendants' accounts. It might be Mitsubishi money, but that has not been established yet, so certainly for the time being the receiver will be authorized to issue checks on those particular accounts to pay defendants' attorneys.
>
> . . . .
>
> I am not going to authorize, as I indicated earlier, the payment of any funds in defense of the criminal action [resulting from the same alleged scheme to defraud Mitsubishi], but certainly the civil action, until there is some adjudication here, even though there might be a fairly clear indication these funds are Mitsubishi funds, I think these people are entitled to employ attorneys without the chilling effect of having the attorneys face the possibility of returning the funds.

ing the funds paid by the appellees from the operation of the court's temporary restraining order—and differing only insofar as they apply to different sets of appellees.[11] By the time of oral argument, substantial amounts of money had been paid to defense counsel under these orders.[12]

In these appeals, we must decide whether the district court erred when it awarded attorneys' fees to counsel for the appellees and exempted such fees from the provisions of the temporary restraining order as well as the operation of any constructive trust that might be impressed on final judgment.

II.

Because Mitsubishi seeks interlocutory appellate review of pretrial district court orders, we initially must decide whether we have jurisdiction over these consoli-

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[11] The appellees fall into several clusters according to their roles in the transactions described by Mitsubishi, as well as according to the counsel fees order by which they were permitted to disburse their own assets to pay their defense costs. They are: (1) Cardinal Textile Sales, Inc., Consolidated Trading Co., United General Marketing, Inc., and Charles W. Jones; (2) General Sales & Leasing Co., Classic Sales, and Robert E. Lee; (3) Purvis Sikkelee International, Ltd., Skein Dyers of America, Inc., William J. Purvis, and William L. Sikkelee; and (4) Fibertex Textile Supplies, Inc. and Hershel Nunley. Mitsubishi's motion voluntarily to dismiss the appeals as to the Fibertex Defendants was granted on December 2, 1992.

In the discussion of the challenged attorneys' fee orders that follows, we use the name of the principal business entity, e.g., "Cardinal" or "PSI," to refer to the appropriate enumerated group of related defendants in its entirety.

[12] Between October 1, 1991, and May 1, 1992, the district court authorized the release of over $625,000 to counsel for General and Cardinal. In addition, counsel for PSI was allowed to draw down almost $95,000 for their $250,000 retainer on October 1, 1991. The fee applications by Fibertex are under seal, but the court has authorized payment of fees to their attorneys on three occasions.

dated appeals. Under the final judgment rule, a preliminary determination during the course of trial court proceedings ordinarily is not reviewable by an appellate court until an ultimate judgment has been rendered in the case. However, "[a]n order involving injunctive relief issued prior to the entry of a final judgment generally may be appealed under the statutory exception to the final judgment rule embodied in § 1292(a)(1) of the Judicial Code." 11 Charles Allan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2962, at 612 (West 1973).[13] Accordingly, we must examine the nature of the orders from which Mitsubishi appeals to determine whether they constitute appealable orders involving injunctive relief.

Although it is not always an easy task properly to characterize a district court's interlocutory orders, such a determination is crucial under the relevant statutory and decisional law defining appellate court jurisdiction. Final judgments and collateral orders are appealable, for example, but nonfinal orders are not; preliminary injunctions are appealable but temporary restraining orders are not.[14] Indeed, it may not always be clear that the court

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[13] Section 1292(a)(1) provides that the courts of appeals have jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions." 28 U.S.C. § 1292(a)(1) (1988).

[14] It should be noted, however, that this court is not bound to accept a district court's characterization of its own rulings. As we have explained, "[a]lthough a temporary restraining order is not ordinarily appealable, where the order has the effect of a preliminary injunction this court has jurisdiction to review the order and is not bound by the district court's designation of the order." *Haitian Refugee Center, Inc. v. Baker*, 950 F.2d 685, 686 (11th Cir. 1991). In our view, the temporary restraining order entered in this case had the effect of a preliminary injunction because it did not merely preserve the status quo but instead granted affirmative relief. We add, however, that articulating this view is unnecessary to our disposition of these appeals.

has rendered a decision relating to an injunction at all. It is well-established, however, that:

> [A] district court may not avoid immediate review of its determination simply by failing to characterize or label its decision as one denying or granting injunctive relief. For example, when a court declines to make a formal ruling on a motion for a preliminary injunction, but its action has the effect of denying the requested relief, its refusal to issue a specific order will be treated as equivalent to the denial of a preliminary injunction and will be appealable.

11 Wright & Miller, *supra*, § 2962, at 614. *See also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88, 108 S.Ct. 1133, 1142-43, 99 L.Ed.2d 296 (1988) (explaining that section 1292(a)(1) "provide[s] appellate jurisdiction over orders that grant or deny injunctions and orders that have the practical effect of granting or denying injunctions and have 'serious, perhaps irreparable, consequence'" (citation omitted)).

Several decisions illustrate the operation of this principle that appellate courts evaluating their jurisdiction should examine the effect, and not merely the letter, of interlocutory district court orders to be reviewed. In *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981), for example, the district court denied a joint motion of the parties for entry of a consent decree that included provisions for injunctive relief. The Supreme Court held that the lower court's ruling was appealable under section 1292(a)(1) because, "[a]lthough the District Court's order declining to enter the proposed consent decree did not in terms 'refuse' an 'injunction,' it nonetheless had the practical effect of doing so." *Id.* at 83, 101 S.Ct. at 996. *See also Rolo v. General Dev. Corp.*, 949 F.2d 695, 703 (3d Cir. 1991) (reviewing district court's order that, although not labelled as such, had "practical effect" of refusing preliminary injunction). Appellate courts have even iden-

tified appealable denials of preliminary injunctions in rare cases in which the district court in fact issued no order at all. In *United States v. Lynd*, 301 F.2d 818, 822 (5th Cir.), *cert. denied*, 371 U.S. 893, 83 S.Ct. 187, 9 L.Ed.2d 125 (1962),[15] the trial court had failed to enter a temporary injunction for months, despite repeated applications by the government. The court of appeals concluded that "[t]he movant, under such circumstances, was clearly entitled to have a ruling from the trial judge, and since he did not grant the order his action in declining to do so was in all respects a 'refusal,' so as to satisfy the requirements of Section 1292. . . ." *Id.*

Under the foregoing set of principles, this court is vested with flexibility in characterizing the orders from which Mitsubishi appeals; we are not cabined by the district court's terminology. The precedents cited above demonstrate that a reviewing court will look at the actual effect of an order that was issued by a district court when determining whether an appeal should be allowed under section 1292(a)(1).

As noted above, the parties in this case consented to the extension of the court's July 3, 1991, temporary restraining order that, through its broad wording, essentially froze the assets of the defendants pending trial. Thus, no controversy exists over the terms of that order. For the court's purposes, the parties had agreed to freeze those assets for a period of time. The practical effect of the appellees' applications for reasonable counsel fees, however, was to withdraw their consent to at least part of the restraining order; when the district court issued the appealed-from orders concerning counsel fees, it modified the consent order at the application of several of the enjoined parties. Mitsubishi had originally sought a pre-

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[15] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

liminary injunction governing all assets of the defendants that were connected in any way to the money spent by Mitsubishi in the textile transactions. In opposing the appellees' counsel fee applications, Mitsubishi continued to urge this position on the district court. Hence, the attorneys' fee orders at issue here constitute denials, in part, of Mitsubishi's requests for injunctive relief. As such, they are appealable under section 1292(a)(1).[16]

The circumstances surrounding the district court's rulings on the counsel fee applications support our conclusion that the appealed-from orders constitute denials of Mitsubishi's request for a preliminary injunction. First, the court's orders are not transitory or effective merely for a period of time too brief to allow an appeal. Rather, they governed the conduct of the parties for months.

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[16] Mitsubishi contends that this court has jurisdiction to review the district court's orders under 28 U.S.C. § 1291, before litigation on the merits is complete, because the orders are final and collateral to the main litigation. To be appealable under the collateral order doctrine, as established in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949)), a district court ruling must: (1) conclusively determine the issue in dispute; (2) resolve a question that is both important and completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment in the case. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978); *Feldspar Trucking Co. v. Greater Atlanta Shippers Ass'n*, 849 F.2d 1389, 1392 (11th Cir. 1988).

If any one of the *Cohen* criteria is not met, this court may not invoke jurisdiction under the collateral order exception to the final judgment rule. *Gulfstream*, 485 U.S. at 276, 108 S.Ct. at 1137; *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1566 (11th Cir. 1987). Because, as the appellees point out in their briefs, the instant appeals raise difficult questions under all three prongs, we believe that section 1292(a)(1) provides the better ground of jurisdiction for this court.

We also find it clearer to view these matters as appeals from denials of the injunctive relief requested by Mitsubishi and not, as seen from the other side of the coin, as appeals from modifications of a consent order at the request of certain enjoined defendants.

More importantly, the district court issued its orders only after hearing from all parties. The attorneys' fee issue was briefed extensively and the court had the benefit of several hearings on related issues when it made its decision; the district court had the opportunity fully to examine the merits of the parties' claims on this issue. Accordingly, it is appropriate to treat the district court's orders as denials of a preliminary injunction. *See, e.g., Sampson v. Murray*, 415 U.S. 61, 86-87 & n.58, 94 S.Ct. 937, 951 & n.58, 39 L.Ed.2d 166 (1974) (classifying court's order as preliminary injunction "where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged"); *Haitian Refugee Center*, 950 F2d at 686 (treating an order denominated as temporary restraining order as, "in effect," preliminary injunction after court had heard from all parties and issue had been briefed).

III.

We review a district court's denial of a preliminary injunction under an abuse of discretion standard. *Cafe 207, Inc. v. St. Johns County*, 989 F.2d 1136, 1137 (11th Cir. 1993); *Lucero v. Operation Rescue of Birmingham*, 954 F.2d 624, 627 (11th Cir. 1992). Appellate review of such a decision is justifiably limited because "the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success . . . with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief." *Revette v. Int'l Ass'n of Bridge Works*, 740 F.2d 892, 893 (11th Cir. 1984) (citation omitted). As we review the denial of the preliminary injunction, "no attention is paid to the merits of the controversy beyond that necessary to determine the presence or absence of an abuse of discretion." *Cafe 207*, 989 F.2d at 1137 (citation omitted).

This court "may affirm the district court's judgment on any ground that appears in the record, whether or not

that ground was relied upon or even considered by the court below." *Powers v. United States*, 996 F.2d 1121, 1123-24 (11th Cir. 1993); *see also United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12, 104 S.Ct. 1495, 1501 n.12, 79 L.Ed.2d 826 (1984). Accordingly, we must examine all possible legal theories that properly could support the pretrial injunctive relief requested by the appellant and implicitly denied in the three challenged counsel fee orders issued by the district court.

Mitsubishi contends that the district court erred in awarding interim attorneys' fees to counsel for the appellees, and in exempting those fees from its temporary restraining order (as well as from any constructive trust that might ultimately be imposed after final resolution of the merits of the case). We first consider and reject the argument that the district court could have prevented the appellees from using their assets to pay their counsel fees under constructive trust law. We then turn to an alternative rationale that might be used to justify Mitsubishi's request: pretrial attachment.[17] Because we find that the

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[17] A third alternative theory, the use of injunctions in aid of a court's jurisdiction, can be quickly dismissed. The All Writs Act, 28 U.S.C. § 1651 (1988), provides that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The All Writs Act "provide[s] a federal court with various common law equity devices to be used incidental to the authority conferred on the court by rule or statute," but only "with those writs necessary to the preservation or exercise of its subject matter jurisdiction." *ITT Community Dev. Corp. v. Barton*, 569 F.2d 1351, 1359-60 (5th Cir. 1978) (citation omitted) (invalidating order that placed disputed funds in court registry and holding that "the fact that a party may be better able to effectuate its rights or duties if a writ is issued never has been, and under the language of the statute cannot be, a sufficient basis for issuance of the writ"). Conduct not shown to be detrimental to the court's jurisdiction or exercise thereof cannot be enjoined under the Act.

The Supreme Court has also emphasized the limited use of injunctions in aid of a court's jurisdiction under the All Writs Act: "[a]lthough th[e] Act empowers federal courts to fashion extraor-

defendants' assets could not have been restrained under either of these theories on the facts now before us, we affirm the district court's orders.

A.

Mitsubishi's argument on appeal is premised upon a mistaken and overly rigid view of constructive trusts: that Mitsubishi has an absolute and immediate right under Georgia constructive trust law to trace and recover any assets that were derived from Mitsubishi funds involved in the textile transactions described in part I.[18] Because a constructive trust is deemed to arise at the time of a fraudulent misappropriation, Mitsubishi contends that it was entitled to an immediate injunction preventing the dissipation of those assets—including payment of appellees' counsel fees—as well as the opportunity to seek disgorgement of any transferred funds. This position, how-

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dinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Pennsylvania Bureau of Corrections v. U.S. Marshals Serv.*, 474 U.S. 34, 43, 106 S.Ct. 355, 361, 88 L.Ed.2d 189 (1985).

In this case, the actions taken by the district court are not indispensable to reaching a disposition of the case, and there was no need for the court to protect its jurisdiction. Service over the defendants has been properly obtained, and no party questions the jurisdiction of the district court to award the relief sought. Accordingly, the injunction here sought would not aid or protect the exercise of the court's powers. Nor, it is clear, was it intended to do so.

[18] Neither the district court's rulings nor the pleadings of the parties in this case explicitly indicate under which causes of action the constructive trust was imposed. Accordingly, we assume that Mitsubishi seeks this remedy with respect to each cause of action stated in the complaint; it would be entitled to the relief sought if a constructive trust is appropriate to any claim. Tort claims are not litigated in equity, however, so Mitsubishi's tortious fraud and RICO claims, being legal claims, cannot sustain the imposition of a constructive trust. Accordingly, the discussion that follows focuses upon Mitsubishi's contractual claims.

ever, fails to recognize that constructive trusts are not automatically impressed whenever one party owes another money, and it apparently overlooks the essence of the remedy—that constructive trusts are inherently equitable in nature and that equitable relief is available only in the absence of an adequate remedy at law.

The constructive trust, a creature of equity, is the "formula through which the conscience of equity finds expression." 5 Austin W. Scott, *The Law of Trusts* § 462, at 3413 (3d ed. 1967) (citation omitted). Indeed, a widely accepted definition holds that "[a] constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Id.* Georgia law provides that "[a] constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." O.C.G.A. § 53-12-93 (Michie Supp. 1993).

It is axiomatic that equitable relief is only available where there is no adequate remedy at law, and there is nothing in the Georgia statutory or decisional law to indicate that ordinary maxims of equity jurisprudence do not apply.[19] Indeed, the Georgia Code specifically provides that "[e]quity will not take cognizance of a plain legal right where an adequate and complete remedy is provided by law." O.C.G.A. § 23-1-4 (Michie 1982). The Georgia Supreme Court has concluded that "equitable relief is improper if the complainant has a remedy at law which

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[19] Pomeroy, the author of a foundational treatise on equity, explains that "it has often been said by courts as well as by text-writers that the equity jurisdiction extends to and embraces all civil cases, and none others, in which there is not a full, adequate, and complete remedy at law." 1 John Norton Pomeroy, *Equity Jurisprudence* § 132, at 160 (4th ed. 1918).

is 'adequate,' i.e., as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." *Mayor of Wadley v. Hall*, 261 Ga. 681, 410 S.E.2d 105, 106 (1991); *see also Stewart v. Walton*, 254 Ga. 81, 326 S.E.2d 738, 739 (1985) ("Equity will grant relief only where there is no available adequate and complete remedy at law.").

Cases in which the remedy sought is the recovery of money (whether as collection on a debt or as damages) do not fall within the jurisdiction of equity, 1 Pomeroy, *supra*, § 178, at 229, and the imposition of a constructive trust generally will not be the appropriate remedy. This principle holds even when the cause of action implicates fraud or some other characteristic that would otherwise trigger equity jurisdiction. As Professor Pomeroy explains:

> Even when the cause of action, based upon a legal right, does involve or present, or is connected with, some particular feature or incident of the same kind as those over which [equity] jurisdiction ordinarily extends, such as fraud, accounting, and the like, still, if the legal remedy by action and pecuniary judgment for debt or damages would be complete, sufficient, and certain—that is, would do full justice to the litigant parties—in the particular case, the concurrent jurisdiction of equity does not extend to such a case.

Id. at 230-31. *See also* 5 Scott, *supra*, § 462.3, at 3419 (explaining that "where money is obtained by fraud, it is held upon a constructive trust for the defrauded person; but if the remedy at law is adequate a suit in equity cannot be maintained against the fraudulent person").

In spite of this authority, Mitsubishi construes the Georgia constructive trust provision to mean that it equitably owns all assets fraudulently taken by the defendants and transferred to any third party, unless the third party paid value for the assets and lacked notice of the fraud at the

time it accepted the assets.[20] None of the Georgia cases upon which Mitsubishi relies, however, involve the sort of contractual, commercial transactions for the sale of goods at issue in this case.[21] Furthermore, the Georgia Supreme Court has suggested in one case, *Bank of Dade v. Reeves*, 257 Ga. 51, 354 S.E.2d 131 (1987), that a constructive trust cannot be imposed for failure to keep implied promises when the parties' conduct is regulated by a contractual relationship. In that case, a mutual exchange of promises provided consideration for the contract between a bank (which held a lien on the debtor's business assets and home to secure the debtor's business loans), a debtor, and a trustee (who was appointed to sell the debtor's assets and to use the proceeds to retire his indebtedness). The court held that the bank's failure

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[20] The exemption for bona fide purchasers arises from O.C.G.A. § 23-1-20 (Michie 1982), which provides that "[a] bona fide purchaser for value without notice of an equity will not be interfered with by equity."

[21] *Bateman v. Patterson*, 212 Ga. 284, 92 S.E.2d 8 (1956), which Mitsubishi emphasizes, involved a bankrupt financial institution that sold cashier's checks to a customer after it knew that it was insolvent. The court held only that "it was error for the trial judge to sustain a general demurrer interposed by the trustee in bankruptcy and also to sustain his motion to dismiss the amended petition" when the plaintiff sought the imposition of a constructive trust over the assets fraudulently obtained "for the purpose of increasing the assets of the insolvent bank." *Id.* at 10.

In addition, two of the cases cited by Mitsubishi employed constructive trusts where parties to a confidential relationship misappropriated or embezzled funds. *See First Nat'l Bank of Cartersville v. Hill*, 412 F.Supp. 422, 425 (N.D.Ga. 1976) (bank president who embezzled funds from bank holds property purchased therewith as constructive trustee); *Adams v. McGehee*, 211 Ga. 498, 86 S.E.2d 525 (1955) (upholding appointment of receiver and issuance of preliminary injunction where bookkeeper appropriated funds received from doctor's patients for her own use). And two older cases relied upon by Mitsubishi concern the fraudulent conveyance of land and the imposition of implied trusts over the disputed property itself. *See Hancock v. Hancock*, 205 Ga. 684, 54 S.E.2d 385 (1949); *Pittman v. Pittman*, 196 Ga. 397, 26 S.E.2d 764 (1943).

to fulfill its contractual obligations (namely, to monitor the sales by the trustee for fairness to the debtor) could not support the imposition of a constructive trust; "[a]t most, there was a breach of contract by the bank," the court concluded. *Id.* at 133.

An examination of the record in this case reveals that Mitsubishi is not entitled to the equitable remedy of a constructive trust because it has an adequate remedy at law.[22] Although the facts as stated by Mitsubishi indicate possible fraud in this case, such fraud arose in the context of a contractual, commercial relationship between Mitsubishi and Cardinal and General, as well as between Mitsubishi and SFI. In the principal transactions, Cardinal and General misrepresented their own creditworthiness (their intent to pay for the yarn they purchased). As such, the remedy Mitsubishi should have sought is the recovery of money for breach of a promise to pay or for an account stated (and not the imposition of a constructive trust). There is no indication in this case that a legal remedy would not be sufficient to vindicate Mitsubishi's rights since it seeks the payment of a debt (along with the statutory damages provided by the federal and state RICO laws). Moreover, if any defendant is held liable in this case, Mitsubishi will have all of the rights of a judgment creditor in Georgia. *See* Fed.R.Civ.P. 69.

The law is clear as to the remedies available to a party who has been fraudulently induced to enter into a contract: the defrauded party may either rescind the contract or stand on the agreement and seek to recover damages. *See generally* 12 Samuel Williston & Walter H.E. Jaeger, *A Treatise on the Law of Contracts* §§ 1526-28 (3d ed. 1970). That is, as Georgia courts have held, "[t]wo actions are available to one who was fraudulently induced

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[22] Furthermore, as mentioned above, a constructive trust is not ordinarily available in an action on a debt or in an action to recover money damages for fraud, whether at common law or under the RICO statutes.

by misrepresentations into entering a contract: he can affirm the contract and sue for breach or seek to rescind and sue in tort for fraud and deceit." *Carpenter v. Curtis,* 196 Ga.App. 234, 395 S.E.2d 653, 655 (1990). Courts ordinarily insist that a party seeking to avoid a fraudulently induced contract tender the consideration it has received (here, the evidence of indebtedness provided by the purchasers of the yarn) and demand restitution of the consideration it has given (here, the yarn itself); absent such an election, the contract is deemed to remain. As Professor Williston has explained:

> It is generally said that a defrauded party must elect whether he will affirm the fraudulent transaction or rescind it. But a transaction although induced by fraud is not on that account void; it is only voidable. Consequently, if nothing is done, the transaction is not avoided, and the rights of the parties will be fixed by the agreement which they made without any manifestation of election.

12 Williston, *supra,* § 1526, at 622. Furthermore, "[t]he retention or use of the subject matter of the fraud is generally considered a conclusive choice of the substantive right of affirmance," *id.,* § 1528, at 632; *see also Brown v. Techdata Corp.,* 238 Ga. 622, 234 S.E.2d 787, 791 (1977). Here, Mitsubishi has attempted to sue on the debt owed it by Cardinal and General (in its accounts receivable action, count VIII of the amended complaint) and has not pursued a proper action for rescission.

We therefore conclude that the district court did not abuse its discretion by allowing the appellees to use their assets to pay their attorneys' fees. Mitsubishi's claims in this case are essentially contractual in nature. Since Mitsubishi possesses an adequate remedy at law, the equitable remedy of a constructive trust is not available to it.

B.

When stripped of the rhetoric of misappropriated assets and constructive trusts, Mitsubishi's complaint essentially seeks the payment of a debt and damages for fraud. Cardinal and General are indebted to Mitsubishi because they failed to pay for the yarn they purchased; in addition, they and the remaining defendants may be liable to Mitsubishi for any fraud they may have committed. Based upon these facts, Mitsubishi states a claim for a money judgment in the form of liquidated damages for breach of the promises to pay or for accounts stated, and in the form of unliquidated damages for any injury caused by fraud. In opposing the counsel fee orders at issue in these appeals, Mitsubishi seeks to tie up the appellees' assets in order to ensure that they will be able to satisfy such a judgment. The temporary restraining order to which the parties consented at the outset of this case was akin to a prejudgment writ of attachment, presented in the form of an injunction against the defendants.[23]

In reality, therefore, Mitsubishi is appealing the district court's refusal to extend the reasoning of that consent order by granting prejudgment attachment of the money paid to counsel for the appellees. Mitsubishi's strategy in this case is to tie up all of the debtors' assets while the parties litigate the issues of indebtedness, breach of promises to pay, potential RICO violations, and the other claims for damages outlined in the complaint. Accordingly, we believe that the proper inquiry before us is whether the district court abused its discretion in declining to issue orders (as requested by Mitsubishi) that would

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[23] Furthermore, the district court appointed a receiver to oversee the assets of Cardinal and General for the stated purpose of protecting the assets in their possession—so that those assets might later be impressed into a constructive trust and/or used to pay any money judgment ultimately obtained by Mitsubishi. The receivership order was not limited to assets received from Mitsubishi (or proceeds therefrom) because the court had not yet determined whether the disputed funds constituted "Mitsubishi money."

have operated, in effect, to attach the assets used by the defendants to pay their attorneys' fees. As is so often the case, "[w]hen the right point of view is discovered, the problem is more than half solved." *Ellison v. Georgia R.R. Co.*, 87 Ga. 691, 13 S.E. 809 (1891) (Bleckley, C.J.).

Under the circumstances of this case, the remedy implicitly sought by Mitsubishi when it opposed the applications for counsel fees by various defendants was equivalent to a writ of attachment When faced with motions appearing to call for an attachment but labelled something else, federal courts again look past the terminology to the actual nature of the relief requested. *See, e.g., Lechman v. Ashkenazy Enter., Inc.*, 712 F.2d 327, 329-30 (7th Cir. 1983); *Ashland Oil Co. v. Gleave,* 540 F.Supp. 81, 83 (W.D.N.Y. 1982) ("It is plain that attachment is the relief sought by plaintiff notwithstanding its labelling as a preliminary injunction; moreover, were it not simply improperly labelled it would be no less necessary to treat plaintiff's motion as one for attachment because the preliminary injunction would be equivalent to an attachment order and thus subject to state law under rule 64's last sentence"). As is the case when we evaluate our jurisdiction, we will call a duck a duck when characterizing district court rulings in this context.

Attachment is an ancillary remedy by which a plaintiff acquires a lien upon the property of a defendant in order to obtain satisfaction of a judgment that the plaintiff may ultimately obtain at the conclusion of the litigation. In general, "the writ of attachment is issued primarily to seize the debtor's property in order to secure the debt or claim of the creditor in the event that a judgment is rendered." *Black's Law Dictionary* 115 (5th ed. 1979). Ordinarily, "[t]he general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment." *In re Fredeman*

Litig., 843 F.2d 821, 824 (5th Cir. 1988) (relying upon the Supreme Court's decision in *DeBeers Consol. Mines Ltd. v. United States*, 325 U.S. 212, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945)).

Rule 64 of the Federal Rules of Civil Procedure, however, authorizes the prejudgment attachment of property for the benefit of a plaintiff in certain situations. Rule 64 makes available to district courts "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action" and provides that, except as otherwise provided by the Constitution or an applicable federal statute, such remedies "are available under the circumstances and in the manner provided by the law of the state in which the district court is held." The rule expressly lists attachment as one such available remedy, along with "other corresponding or equivalent remedies, however designated." *See generally* 7 James W. Moore et al., *Moore's Federal Practice* ¶ 64.04[1] (2d ed. 1993); 11 Wright & Miller, *supra*, § 2932.

Hence, as the Supreme Court has explained, "long-settled federal law provide[s] that in all cases in federal court, . . . state law is incorporated to determine the availability of prejudgment remedies for the seizure of person or property to secure satisfaction of the judgment ultimately entered." *Granny Goose Foods, Inc. v. Brotherhood of Teamsters, Local No. 70*, 415 U.S. 423, 437 n.10, 94 S.Ct. 1113, 1123 n.10, 39 L.Ed.2d 435 (1974). We conclude that Rule 64, and not Rule 65 (which governs injunctions generally), provides the standard for evaluating a request for preliminary injunctive relief that is, in reality, no more than a request for prejudgment attachment; Rule 64 thus properly controls our disposition of these cases.[24]

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[24] Where the state attachment statute does not authorize prejudgment attachment in a given case, a district court is not authorized under Rule 65 to attempt to accomplish the same result by issuing

Mitsubishi did not invoke, and the district court did not at any time address, the Georgia attachment statute. Nor did the court make any findings of fact concerning whether the appellees would fall within the statute's restrictive grounds for prejudgment seizure of assets. In Georgia, prejudgment attachment is subject to the same conditions as postjudgment attachment in cases making demands in contract or in tort. Those conditions are found in the statutes of Georgia:

Attachments may issue when the debtor:

(1) Resides out of the state;

(2) Moves or is about to move his domicile outside the limits of the county;

(3) Absconds;

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a preliminary injunction. Some federal courts have held to the contrary, *see, e.g., Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990), but we believe that such decisions are premised upon erroneous readings of *DeBeers* and federal procedural rules, as well as upon incorrect applications of basic equity jurisprudence.

In *Fredeman*, which involved civil RICO actions for treble damages, the Fifth Circuit reached the same conclusion concerning the availability of this type of preliminary injunction. In that case, the plaintiffs alleged that the defendants had systematically charged them for more fuel than had actually been delivered. Relying upon *DeBeers*, the court vacated a preliminary injunction that prohibited the defendants from transferring their assets. The court focused on the nature of the relief sought:

> The plaintiffs seeks only treble damages, and the district court based its injunction solely on the need to protect those damage claims. The plaintiffs do not ultimately seek return of any particular asset or fund that the interim injunction might secure . . . , nor do they seek to enjoin future illegal conduct.

843 F.2d at 825. On those facts, the court explained, "[t]he district court . . . froze essentially all of the defendants' assets, effectively putting the defendants into involuntary receivership, based on unproven claims for unliquidated damages." *Id.* at 828. The court held that such prejudgment relief was inappropriate, and that the plaintiffs' only recourse was to state attachment law under Rule 64.

(4) Conceals himself;

(5) Resists legal arrest; or

(6) Is causing his property to be removed beyond the limits of the state.

O.C.G.A. § 18-3-1 (Michie 1991).[25] Based on the facts now before us, it does not appear that Mitsubishi is entitled to prejudgment attachment of the assets used by the appellees to pay counsel fees under the orders challenged in these appeals. The appellant has not demonstrated that any of the statutory grounds for attachment apply to the appellees in this case. Moreover, the Georgia statute speaks in permissive and not mandatory terms when granting courts the authority to order prejudgment attachment when these circumstances are present. Therefore, we conclude that the district court did not abuse its discretion in denying Mitsubishi's request for attachment of the assets used by the appellees to pay their attorneys when it issued the counsel fee orders.

IV.

The unusual procedural posture of these appeals, and the foundational questions of judicial authority that they present, has led us to discuss broad principles of equity jurisprudence and federal jurisdiction—most of which are not new to this court or even to this century, having been well-established when Lord Eldon sat on the woolsack. In conclusion, and in the spirit of this opinion's return to the old books, we echo the language used by the Supreme Court nearly a half-century ago:

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[25] O.C.G.A. § 18-3-4 provides that:

> In all cases where the plaintiff has commenced an action for the recovery of a debt and the defendant, during the pendency of such action, shall become subject to attachment, the plaintiff may have an attachment against the defendant; and all the proceedings in relation to the same shall be as prescribed in relation to attachments where no action is pending.

> To sustain the challenged order[s] would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.

DeBeers, 325 U.S. at 222-23, 65 S.Ct. at 1135 (invalidating preliminary injunction freezing defendants' assets in antitrust case in order to satisfy a potential contempt judgment). Prejudgment attachment of the type sought by Mitsubishi is simply not appropriate on the facts presently before us. Mitsubishi does not discuss or "distinguish *DeBeers* or the cases following it, but contend[s] primarily that the defendants are scoundrels who will try to escape judgment, an allegation that, even if true, would not justify the preliminary injunction." *Fredeman*, 843 F.2d at 826.

Because the district court had no authority to prevent the appellees from using their assets to pay their attorneys' fees, we hold that the court did not abuse its discretion in issuing the challenged orders.

AFFIRMED.

CARNES, Circuit Judge, concurring in part and dissenting in part:

I concur in part II of the majority opinion concerning our jurisdiction over this appeal. However, I dissent from parts III and IV of the majority opinion, because Georgia law does permit the imposition of a constructive trust as an equitable remedy for fraud in cases such as this one, and because the district court has the power to enter a preliminary injunction freezing the defendants' assets to preserve that equitable remedy. The first part of this opinion takes issue with the majority's holding that if Mitsubishi prevails, it is not entitled to a constructive trust under Georgia law; the second part takes issue with the majority's holding that a district court in Georgia lacks the authority to enter a preliminary injunction freezing a defendants' assets in a fraud case.

I. AVAILABILITY OF A CONSTRUCTIVE TRUST UNDER GEORGIA LAW

The majority, in part III of its opinion, asserts that a constructive trust is not ordinarily available under Georgia law in an action to recover money damages for fraud. The Supreme Court of Georgia has held to the contrary. In *Watkins v. Watkins*, 256 Ga. 58, 344 S.E.2d 220, 221 (1986), the court explained that:

> This court in *Middlebrooks v. Lonas*, 246 Ga. 720(2), 272 S.E.2d 687 (1980), held that a constructive trust or equitable lien can be imposed to obtain repayment of a loan when the loan was fraudulently procured and no adequate remedy is available at law. The court relied on OCGA § 53-12-26(2), which provides a trust will be implied "[w]here, from any fraud, one person obtains the title to property which rightly belongs to another." The court further held a promise made without a present intent to perform is a misrepresentation of material fact and is sufficient to support a claim of

> fraud. *Middlebrooks*, supra at 721, 272 S.E.2d 687. See also *Restatement of Torts, Second*, § 530(1), p. 64 (1977).

The principle announced in *Middlebrooks* was also reaffirmed in *Eason v. Farmer*, 261 Ga. 675, 409 S.E.2d 509, 511 (1991). The Supreme Court of Georgia—not Pomeroy, or Scott, or anyone who ever sat on a woolsack—is the ultimate arbiter of Georgia law and equity.

Bank of Dade v. Reeves, 257 Ga. 51, 354 S.E.2d 131 (1987), which the majority cites for the proposition that a constructive trust cannot be imposed for failure to fulfill contractual obligations, is inapposite. In that case, the Supreme Court reversed a trial court's decision to impose a constructive trust *because there was no fraud:*

> In imposing a constructive trust on the residential property in favor of the Reeves the trial court found there was a confidential relationship between the bank and the Reeves and the bank's action, considering the relationship, amounted to innocent or constructive fraud. In our view there is no evidence in the record to support this finding. At most, there was a breach of contract by the bank.

Id. 354 S.E.2d at 133. Because the present case does involve fraud, it is *unlike Reeves*—where the court set aside a constructive trust—and is *like Middlebrooks* and *Eason*—where the availability of constructive trusts as a remedy for fraud was confirmed.

Middlebrooks involved a loan which the borrower had no intention to repay. According to the majority's own account of this case, Mitsubishi's situation is the same: as one part of the alleged scheme, Charles Jones and Robert Lee, who owned and managed Cardinal and General, respectively, filed false bills of lading to get Mitsubishi to extend them credit to buy yarn that did not exist; when they took out the loans, Jones and Lee had no intention of repaying the debt. The district court found that the

> Defendants concealed from Mitsubishi that the carpet yarn which Mitsubishi paid for was nonexistent in 93 percent of the transactions. Defendants misrepresented through documents, particularly invoices and packing lists, that yarn existed for every transaction with Mitsubishi. . . . The Jones and Lee defendants misrepresented to Mitsubishi who their final customers were and the fact that the Jones and Lee Defendants were making some payments to Mitsubishi for yarn which did not exist.

In short, the court found that there was an elaborate scheme to defraud Mitsubishi. Under Georgia law, the victim of a fraud is entitled to have a constructive trust imposed on the defendants' ill-gotten gain, if there is no adequate remedy at law. *Middlebrooks,* 272 S.E.2d at 689.

An equitable remedy is not foreclosed merely because " 'there is a remedy at law. It must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.' " *Ward v. Walker,* 222 Ga. 451, 151 S.E. 2d 228, 230 (1966) (quoting *Altantic Coast Line R.R. Co. v. Gunn,* 185 Ga. 108, 194 S.E. 365, 367 (1937)). In addition to holding, erroneously, that a constructive trust is not an available remedy for fraud in Georgia, the majority also holds that Mitsubishi is not entiled to a constructive trust because it has an adequate remedy at law—namely, the availability of a suit for damages and all of the rights of a judgment creditor in the state of Georgia. The majority's position—that the rights of a judgment creditor in Georgia are necessarily adequate and therefore foreclose the imposition of a constructive trust—has already been rejected by the Georgia Supreme Court. In *Middlebrooks,* the court held that, because a judgment creditor takes subject to the rights of a previous mortgagee, while a plaintiff who establishes a constructive trust or an equitable lien does not, the legal remedy is

inadequate. 272 S.E.2d at 689. In this case, the district court found, and the majority does not dispute, that the defendants had been dissipating Mitsubishi's funds, thereby threatening Mitsubishi's ability to recover its losses should it prevail at trial. The Georgia Supreme Court, whose holdings we cannot question, has held that there is no adequate legal remedy where the defendant threatens to dissipate its assets. *Southern Land, Timber, & Pulp Corp. v. Eunice,* 219 Ga. 338, 133 S.E.2d 345, 349 (1963) (holding that equity jurisdiction is properly invoked when plaintiff produces evidence that defendant may dissipate its assets). Mitsubishi's remedy at law is therefore inadequate, and an equitable remedy is appropriate.

The majority opinion, citing *Brown v. Techdata Corp., Inc.*, 238 Ga. 622, 234 S.E.2d 787, 791 (1977), also holds that in order to sue for damages for fraud, Mitsubishi should have sought to avoid the contract by tendering the consideration that it received (the evidence of indebtedness) and demanding restitution. However, a recent Georgia appellate decision emphasized that "[a]ffirmance of the contract by the defrauded party does *not* necessarily deprive him of the right to sue for damages for fraud." *Carpenter v. Curtis,* 196 Ga.App. 234, 395 S.E.2d 653, 655 (1990) (emphasis added). The majority has equated the remedy of restitution with that of money damages or a constructive trust. While Georgia law requires that a plaintiff seeking restitution (such as the plaintiff in *Brown*) rescind the contract, there is no such requirement for those seeking a constructive trust. *Middlebrooks* and *Farmer* do not mention rescission or a tender requirement, and *Watkins* is flatly inconsistent with the idea. In *Watkins*, the Supreme Court of Georgia allowed the plaintiff to go forward with a fraud claim despite the fact that she was still holding a note evidencing the debt in question, which, under the majority's theory, would have defeated the claim. 344 S.E.2d at 221-22.

Furthermore, even if the rescission requirement did apply to this suit, a constructive trust would still be available. The majority has overlooked an important condition in *Brown*. *Brown* held that " '[a] contract may be rescinded at the instance of the party defrauded; but, in order to rescind he must promptly, upon discovery of the fraud, restore or offer to restore to the other whatever he has received by virtue of the contract *if it be of any value.*' " *Brown*, 234 S.E.2d at 791 (quoting Ga. Code § 20-906, recodified at OCGA § 13-4-60) (emphasis added). Mitsubishi does not hold anything of value as a result of the fraudulent transactions that victimized it, so there is nothing of value to restore to the defendants.

Therefore, the majority is wrong: if Mitsubishi prevails at trial on its fraud claim, it will be entitled to the imposition of a constructive trust under Georgia law. For the reasons that follow, the majority is also wrong in concluding that a federal district court in Georgia lacks the power to enter a pretrial injunction freezing the defendants' assets in a fraud case.

II. AUTHORITY OF THE DISTRICT COURT TO ENTER THE PRELIMINARY INJUNCTION FREEZING DEFENDANTS' ASSETS

The majority, expressing its willingness "to call a duck a duck," contends that the remedy Mitsubishi implicitly sought when it opposed the applications for counsel fees by various defendants was equivalent to a writ of attachment. Admittedly, under Fed.R.Civ.P. 64 and the Georgia attachment statute, the court could not have attached the money in question. However, one should not be quick to lend the majority a retriever the next time it goes duck-hunting; what the majority insists on calling an unauthorized writ of attachment is in fact a permissible preliminary injunction.

The majority's position was examined and rejected by the Sixth Circuit in *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 97 (6th Cir. 1982). The *USACO* court, affirming a district court's preliminary injunction freezing the defendants' assets, explained that attachment under Rule 64 is a process used to protect *damage* remedies, and does not apply to injunctions used to protect *equitable* remedies. *Id.* Because the district court in that case acted to preserve the plaintiff's equitable remedy, "defendants' arguments based on *DeBeers*" (which the majority also cites) "and [Fed.R.Civ.P.] 64 concerning the court's power to sequester assets as security for a potential damage award are inapposite. The injunction here preserves assets for which the defendants may be accountable under a constructive trust." *Id.* Exactly the same is true in this case. The Sixth Circuit's holding in *USACO* was endorsed by the Fifth Circuit in *FSLIC v. Dixon*, 835 F.2d 554, 560 (5th Cir. 1987):

> [A]n injunction is not permissible to secure post-judgment legal relief in the form of damages. Such an injunction to secure future payment of possible money damages would be in the nature of a "pre-judgment attachment" subject to Federal Rule of Civil Procedure 64, and through that rule to the strictures of state law.
>
> Nevertheless, case law *does* allow a district court to exercise its equitable power in ordering a preliminary injunction to secure an equitable remedy. . . .

(internal citations and footnote omitted).

Under Fed.R.Civ.P. 65, federal law, rather than Georgia law, governs the grant of a preliminary injunction to preserve the relative positions of the parties until a trial on the merits can be held. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1448 (11th Cir. 1991); 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2943, at 390 (1973). This Circuit has

already held that a district court has the power under Rule 65 to freeze a corporation's assets in order to preserve the status quo and future equitable remedies. *Meis v. Sanitas Serv. Corp.*, 511 F.2d 655 (5th Cir. 1975). We, of course, are bound by that decision. *E.g., Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (cases from the former Fifth Circuit are binding precedent in the Eleventh Circuit).

Our prior holding in *Meis* is entirely consistent with that of the other circuits that have considered the question. As the Sixth Circuit explained in its *USACO* opinion:

> The power of the district court to preserve a fund or property which may be the subject of a final decree is well established. We believe this rule is applicable in the present case where the district court found that the defendants' property was likely to be the subject of a constructive trust imposed for the benefit of the plaintiffs. *As the Supreme Court stated in* DeBeers, "*A preliminary injunction is always appropriate to grant intermediate relief of the same character as that which may be granted finally.*" In *DeBeers* an injunction was held not to grant relief "of the same character" which might be granted finally because the injunction dealt "with property which in no circumstances can be dealt with in any final injunction that may be entered", and thus only served to secure a potential money judgment. *Id.* By way of contrast, in the present case the property subject to the injunction may well be dealt with by a final decree in equity requiring an accounting by the defendants as constructive trustees for the plaintiffs.

689 F.2d at 97-98 (emphasis added) (internal citations omitted) (quoting *DeBeers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 220, 65 S.Ct. 1130, 1134, 89 L.Ed. 1566 (1945)). *See also Dixon*, 835 F.2d at 560; *FTC*

v. H.N. Singer, Inc., 668 F.2d 1107, 1112 (9th Cir. 1982); *Lynch Corp. v. Omaha Nat'l Bank*, 666 F.2d 1208, 1211-13 (8th Cir. 1981).

III. CONCLUSION

Because the district court has the power under Georgia law to impose a constructive trust, it has the power under Rule 65 to grant a preliminary injunction, freezing the defendants' assets in order to preserve that remedy. No one suggested otherwise in this appeal until this Court pointedly raised the question in a request for supplemental briefing that came months after oral argument. The majority says that when the correct point of view is discovered, the problem is mostly solved, but we should question the correctness of a point of view that remained hidden for so long.

The district court found that there is a substantial likelihood that Mitsubishi will prevail at trial. But what good will that do it? Because of today's decision, Mitsubishi's ultimate victory is likely to be an empty one. The district court was convinced that an injunction was necessary, because the defendants in this case "have dissipated Mitsubishi's funds and engaged in artifices and deceits designed to conceal misappropriated funds rightfully belonging to Mitsubishi." Now, this Court has given the defendants a license to plunder and dissipate what is left of the equitable estate, and the district court will be powerless to stop it. If that result were required by law, it would be bad enough. Coming as it does when the law provides a means to prevent it, the result is worse still.

I dissent from the majority's holding that the district court lacked the power to impose a constructive trust on the defendants' assets in these circumstances, and I would have the Court proceed to decide the sole issue initially raised and argued by the parties in this appeal: whether the district court abused its discretion in permitting some constructive trust funds to be paid out for legal representation of the defendants.

[Filed Oct. 27, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 1:91-cv-1510-MHS

MITSUBISHI INTERNATIONAL CORPORATION,
Plaintiff,

v.

CARDINAL TEXTILE SALES, INC., *et al.*,
Defendants.

ORDER

The hearing on plaintiff Mitsubishi International Corporation's motion for a preliminary injunction prohibiting certain individual and corporate defendants from dissipating, transferring, pledging, encumbering, selling, disposing of, or making any other use of any money received either directly or indirectly from Mitsubishi International Corporation ("Mitsubishi") or any property purchased with such money took place on February 24-27, 1992, and March 2-3, 1992. Of the 17 defendants against whom Mitsubishi sought a preliminary injunction,[1] only two defendants, Charles W. Jones ("Jones") and Robert E. Lee ("Robert Lee") (along with the five companies established and controlled by Jones and Robert Lee),[2] actively participated in the preliminary injunc-

[1] Mitsubishi did not seek a preliminary injunction against defendants Hunter Transport Company, Inc. ("Hunter Transport"), Roy M. Hunter ("Hunter"), and ConAgra, Inc., d/b/a Tennessee Cold & Dry Storage ("ConAgra").

[2] Jones controls three companies: Cardinal Textile Sales, Inc. ("Cardinal"), Consolidated Trading Company ("Consolidated") and United General Marketing, Inc. ("United General") (collec-

tion hearing. Three other groups of defendants, Fibertex Textile Supplies ("Fibertex") and its president, Hershel Nunley ("Nunley"); Sun Fibres, Inc. ("Sun Fibres") and its president, Joseph L. Smith ("Smith"); and the PSI Defendants,[3] consented to the entry of a preliminary injunction prior to the hearing.[4] *See* Orders dated December 3, 1991, February 12, 1992, and February 21, 1992.

Just prior to the hearing, Mitsubishi filed a motion to have a preliminary injunction entered against Mary Ellen Lee ("Ellen Lee") and Raymond B. Lippincott, III ("Lippincott"), pursuant to Northern District of Georgia Local Rule 220-1(b)(1) based on defendants' failure to file responses to Mitsubishi's motion for a preliminary injunction. The same day Mitsubishi filed its motion, Ellen Lee filed both a response opposing Mitsubishi's motion and a motion to adopt the briefs of the Jones and Lee Defendants. Ellen Lee did not participate in the preliminary injunction hearing, however. The Court will grant Ellen Lee's motion to adopt the briefs of the Jones and Lee defendants and deny Mitsubishi's motion to have a preliminary injunction entered against her Lee pursuant to Local Rule 220-1(b)(1). However, because Lippincott has not filed a response to Mitsubishi's motion for a preliminary injunction, the Court will grant Mitsubishi's motion to have a preliminary injunction entered against Lippincott pursuant to Local Rule 220-1(b)(1). The evidence overwhelmingly supports the entrance of a preliminary injunction against Lippincott in any event.

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tively "the Jones Defendants"). Robert Lee controls two companies: General Sales & Leasing Company ("General") and Classic Sales, Inc. ("Classic Sales") (collectively "Lee Defendants").

[3] The PSI Defendants include William J. Purvis ("Purvis"), William L. Sikkelee ("Sikkelee"), Purvis-Sikkelee International, Ltd. ("PSI"), and Skein Dyers of America, Inc. ("Skein Dyers").

[4] Recently, Smith and Sun Fibres and Nunley and Fibertex agreed to the entry of consent judgments against them. *See* Orders dated August 8, 1992, and October 8, 1992.

Defendants have been restrained from dissipating or making any use of the assets which may be part of Mitsubishi's constructive trust since July 3, 1991, through a temporary restraining order. *See* Order dated July 3, 1991. On August 22, 1991, the Court appointed a receiver ("the Receiver") to further preserve and maintain the assets then in the possession of the Jones and Lee Defendants. *See* Order dated August 22, 1991 ("the Receivership Order"). Prior to the hearing, Mitsubishi filed a motion to amend the Receivership Order. The Court's ruling that Mitsubishi is entitled to a preliminary injunction moots Mitsubishi's motion to amend the Receivership Order.

After hearing the witnesses, observing their demeanor and credibility,[5] reviewing the documentary evidence, receiving deposition excerpts, and carefully considering the pleadings and the arguments of counsel, the Court enters the following findings of facts and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, which are based in large part on Mitsubishi's proposed findings of fact and conclusions of law.[6]

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[5] Although the Court's credibility determinations are implicit in the Court's findings of fact, certain determinations are of particular importance and should be noted. The Court found Mitsubishi's expert, William Lewis Jennings ("Jennings"), and Smith, one of Mitsubishi's primary witnesses, to be credible and persuasive. Conversely, the Court found plaintiff's witness Jerry Lee Murphy ("Murphy"), a former employee of General, not to be very credible, although the Court found Murphy's testimony regarding the "paperwork" to be essentially correct. The Court also found Purvis, one of the two witnesses called by defendants, not to be credible. The Court found the other witness called by defendants, James Earl Brum ("Brum"), general counsel for Mitsubishi, to be credible and persuasive. In particular, the Court credits Brum's testimony that Smith's statement regarding payoffs was in language that did not unduly concern Brum.

[6] Implicit in many of the arguments advanced by some defendants in their responses to Mitsubishi's proposed findings and conclusions

I. FINDINGS OF FACT

A. *The Yarn Transactions as Understood by Mitsubishi*

1.

Mitsubishi first became involved with the Jones and Lee Defendants when Lippincott and Ellen Lee, who worked in Mitsubishi's Textile Trading Department at its Atlanta branch, began buying and selling yarn for Mitsubishi.

2.

Lippincott had been a trusted Mitsubishi employee with many years of service with Mitsubishi. He had a distinguished employment career with Mitsubishi including participation in special textile training programs with Mitsubishi's parent corporation in Japan and in the Textile Department at Mitsubishi's headquarters in New York. After this special training, Lippincott returned to Atlanta to act as the assistant general manager of the Atlanta branch and the manager of the Atlanta Textile Trading Department. As manager of the Textile Department, Lippincott had broad authority and discretion to handle textile transactions in the best interests of Mitsubishi and in accordance with Mitsubishi policies. Lippincott was then promoted by Tsuyoshi Noma ("Mr. Noma"), the general manager of the Atlanta branch, to deputy general manager of the Atlanta branch and as such Lippincott continued to be the highest level employee in the Atlanta branch with responsibility for textile transactions. Accordingly, Lippincott was a fiduciary of Mitsubishi.

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is the belief that the Court's findings and conclusions are binding at the trial on the merits. Such fear is unfounded. *See University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits").

3.

Ellen Lee was Lippincott's immediate subordinate, assistant manager of the Atlanta Textile Trading Department, and a trusted Mitsubishi employee. Ellen Lee had been consistently evaluated as an outstanding employee. Accordingly, Ellen Lee was also a fiduciary of Mitsubishi.

4.

Mr. Noma was the general manager of the Atlanta branch for a substantial period during which the defendants engaged in the yarn transactions with Mitsubishi. Mr. Noma spent the majority of his Mitsubishi career managing various aspects of Mitsubishi's steel trading business. Prior to his assignment as general manager in Atlanta in 1987, Mr. Noma had never been involved in the business of textile trading. Mr. Noma relied on Lippincott and Ellen Lee to conduct the textile trading business in the Atlanta branch and trusted their business judgment.

5.

The initial contact between Smith and Mitsubishi occurred in 1988, when Smith approached Lippincott and offered to sell industrial yarn to Mitsubishi through his company in Alabama, Sun Fibres. Soon thereafter, Sun Fibres and Mitsubishi engaged in business transactions involving industrial yarn in which Sun Fibres purchased industrial yarn and sold it to Mitsubishi, which then immediately sold the industrial yarn to third parites. These industrial yarn transactions continued through the summer of 1991.

6.

The carpet yarn transactions began in the spring of 1989, five months after Smith's initial meeting with Lippincott. Smith represented to Mitsubishi through Lippincott that he was able to purchase second quality carpet yarn directly from E.I. DuPont De Nemours Company

("DuPont") of a description and amount suitable for resale by Mitsubishi.

7.

Mitsubishi's sole purchasers of the yarn were to be defendants Cardinal and General, which were owned and managed by Jones and Robert Lee, respectively.

8.

Jones and Robert Lee, whose businesses were located in the Dalton area, represented to Mitsubishi that they would be reselling the carpet yarn to carpet makers also located in the Dalton area.

9.

As represented to Mitsubishi by Lippincott, these carpet yarn transactions were "back-to-back" transactions, such that Mitsubishi would sell the yarn to the Jones and Lee Defendants almost immediately after it purchased the yarn from Sun Fibres.

10.

For carpet yarn transactions, Mitsubishi paid for its purchases from Sun Fibres through a domestic letter of credit established at the C&S National Bank in Atlanta, Georgia ("C&S"). Under the letter of credit agreement, C&S would only issue credit to Sun Fibres through Sun Fibres' bank in Oxford, Alabama, after Sun Fibres presented documents verifying Mitsubishi's yarn purchase from Sun Fibres and delivery of that yarn to Mitsubishi's customers.

11.

Sun Fibres was required to fax four documents to C&S in Atlanta in order to draw upon the letter of credit: (i) an *invoice* showing Sun Fibres' sale of yarn to Mitsubishi, (ii) a trucker's *bill of lading* evidencing shipment to Mitsubishi's customers, i.e., the Jones and Lee De-

fendants, (iii) a *packing list* identifying the specific type and amount of yarn Mitsubishi purchased for immediate resale to Mitsubishi's customers, and (iv) a Mitsubishi *purchase order,* signed by Lippincott showing Mitsubishi's purchase of the yarn from Sun Fibres. Each invoice, bill of lading, and packing list described a unique load of yarn, identifying denier type, merge, and total weight of the load of yarn. The packing list also described the weight of each unit of yarn which comprised the load.[7]

12.

Mitsubishi's understanding of the yarn transactions continued until mid-1991 when Mitsubishi and federal law enforcement authorities discovered that the Jones and Lee Defendants, Lippincott, and Ellen Lee, as well as the other named defendants had misappropriated $50 million from Mitsubishi.

B. *Overview of the Carpet Yarn Transactions*

13.

Smith misrepresented to Mitsubishi that he bought yarn directly from DuPont. In fact, the yarn transactions were set up so that all of the purported carpet yarn purchases by Sun Fibres were from the PSI Defendants, Fibertex, and the Jones and Lee Defendants.

14.

The Jones and Lee Defendants concealed from Mitsubishi that they were, at least on paper, both Mitsubishi's customers and suppliers of the yarn. They misrepresented to Mitsubishi that they were selling the yarn to third party entities such as Salem Carpets, Burlington Industries, and World Carpets when in fact the Jones and Lee Defendants were invoicing the yarn either to the PSI

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[7] Sun Fibres also executed a *beneficiary's certificate* which stated that Sun Fibres had faxed copies of the documents to Mitsubishi for each draw on the letter of credit.

Defendants who invoiced the yarn to Sun Fibres or directly to Sun Fibres which was "selling" it back to Mitsubishi.

15.

The PSI Defendants, who were Sun Fibres' and thus Mitsubishi's only suppliers of *real* carpet yarn, purchased from Clayton Causby, a yarn broker in the Dalton area, and sold to Sun Fibres 5.6 million pounds of real yarn.

16.

Sun Fibres sold an additional 78.6 million pounds of nonexistent yarn to Mitsubishi. Thus, 93 percent of the 84.2 million pounds of yarn allegedly sold to Mitsubishi and allegedly purchased by the Jones and Lee Defendants never existed.

17.

Smith misrepresented the business of Sun Fibres when Mitsubishi officials visited Sun Fibres' plant. Smith made statements and took actions to induce Mitsubishi to believe that the plant was in full operation and had yarn inventory when those facts were not true.

18.

Jones, Robert Lee, Lippincott, Ellen Lee, and Smith often met to discuss the yarn transactions at "yarn dinners."

C. *The Mechanics of the Carpet Yarn Transactions*

1. *Stage 1: Spring 1989 through Fall 1989*

19.

The basic scheme used by the conspirators was established in 1989 when United General, one of the Jones Defendants, began selling carpet yarn to the PSI Defendants, which the Jones and Lee Defendants had purchased from Mitsubishi.

20.

In this early stage, General, one of the Lee Defendants, was buying real yarn from Clayton Causby and selling it to third parties.[8] Using the documentation from these real yarn purchases, General created phony documents to invoice United General.

21.

United General would then use the invoices and packing lists from General to create phony sales to the PSI Defendants.[9]

22.

The PSI Defendants in turn used these documents to create their own invoices and packing lists to invoice Sun Fibres.

23.

Using the packing lists from the PSI Defendants,[10] Sun Fibres prepared documents, including invoices, packing lists, and bills of lading, representing sales to Mitsubishi. These documents were used by Sun Fibres to draw Mitsubishi money on the letter of credit.

24.

Lippincott and Ellen Lee used the documents which were either faxed or sent express mail from Sun Fibres to generate invoices evidencing phony sales to Cardinal. Cardinal then invoiced General, thus completing the circle.

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[8] Clayton Causby stopped shipping yarn to General in late 1990.

[9] Kim Purvis, who worked for the PSI Defendants, testified that the Jones Defendants drove this paperwork over to PSI without any yarn.

[10] The PSI Defendants would take the documents to defendant ConAgra in Chattanooga, Tennessee, which would forward them to Sun Fibres.

25.

Some of the 5.6 million pounds of carpet yarn which the PSI Defendants actually sold to Mitsubishi was also used to support subsequent phony transactions. The PSI Defendants sold the real yarn to Sun Fibres which sold it to Cardinal which sold it to General which sold it to third parties. General then created phony paperwork from the documentation and used it to induce Mitsubishi to pay for nonexistent yarn.

2. *Stage 2: Fall 1989*

26.

In the fall of 1989, a new stage began whereby Jones established Consolidated as a sole proprietorship to take over United General's initial role as the supplier of the yarn to the PSI Defendants.

27.

During this second stage, the documentation went around in the same circle as described above, with the exception that Consolidated, instead of United General, was "purchasing" yarn from General and "selling" it to the PSI Defendants.

28.

The PSI Defendants in one instance sold 41,727.9 pounds of real yarn to Sun Fibres which sold it to Mitsubishi which sold it to Cardinal which sold it to General. Based on that single transaction, General created phony paperwork to induce Mitsubishi to pay for an additional 876,180.9 pounds of nonexistent yarn. General invoiced Consolidated for nonexistent yarn which invoiced the PSI Defendants who invoiced Sun Fibres which invoiced Mitsubishi. Lippincott and Ellen Lee at Mitsubishi then invoiced Cardinal which invoiced General, thereby completing the circle.[11]

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[11] In this instance, there were 20 phony loads of yarn sold to Mitsubishi. For each sale, General invoiced Consolidated for the

29.

Apparently, Consolidated was created by Jones solely as a means to facilitate the carpet yarn transactions. In fact, 99 percent of Consolidated's total deposits were related to Mitsubishi sales. Jones, as the sole proprietor of Consolidated, has pled the Fifth Amendment in response to questions regarding Consolidated's complicity in the fraud.

3. *Stage 3: Summer 1990*

30.

In May of 1990, General began using a new inventory system. Under this new system, General gave each actual load of yarn that came into the warehouse a unique inventory number. When General sold and delivered the real yarn to third parties, Murphy highlighted the particular load of yarn in the inventory book.

31.

General then used the documents relating to the real load of yarn to create phony documents evidencing phony sales of yarn. Many of these documents were fraudulently created based on loads of yarn which General had already sold to third parties. Each time the load of yarn was used to create phony documents, the inventory number was printed with an alphabetical suffix on the phony bill of lading. Each time new paperwork from the same load of yarn was created, the inventory number with the next letter in the alphabet was printed on the bill of lading.

32.

Apparently, the inventory book described by Murphy no longer exists. Despite Mitsubishi's repeated requests

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same yarn, i.e., same weight, denier, and merger number. The weights were then changed on the documents showing the sale by Consolidated to the PSI Defendants. General often sold the *same* yarn to Consolidated several times on the *same* day.

for production of that inventory book, it has not been produced. In response to a specific interrogatory asking whether the inventory book had been destroyed, removed or discarded, Robert Lee invoked the Fifth Amendment.

4. *Stage 4: Fall 1990 through Summer 1991*

33.

The final major change occurred in the fall of 1990 and continued through mid-1991 when the Jones and Lee Defendants phased out the participation of the PSI Defendants and created three fake "suppliers" of yarn for Sun Fibres: United General, Classic Sales, and Fibertex.

34.

United General and Classic Sales are directly controlled by the Jones and Lee Defendants, respectively.

35.

Jones and Robert Lee requested that Sun Fibres use these new entities to provide better control of the cash flow and also so that the Jones and Lee Defendants could take a larger percentage of Mitsubishi's money.

36.

While Classic Sales, United General, and Fibertex received over $30 million from Sun Fibres during the course of the carpet yarn transactions, these three entities ultimately retained only approximately $1.5 million, having passed virtually all of the money directly to Consolidated. The use of these entities instead of the PSI Defendants had the effect of increasing cash flow to Consolidated.

37.

The flow of paperwork using the fake suppliers of yarn was similar to the earlier stages.

38.

During this last stage, the volume of the purported yarn sales increased significantly.

D. *The Roles of Hunter Transport and ConAgra*

39.

The carpet yarn scheme deceived Mitsubishi over a period of years in part because of the participation of a Tennessee trucking company and a Tennessee warehouse facility, defendants Hunter Transport and ConAgra.

40.

From the spring of 1989 until the fall of 1990, Hunter Transport and ConAgra participated in the shuttling of carpet yarn back and forth between Dalton, Georgia, and Hunter Transport's and ConAgra's places of business in Chattanooga, Tennessee. Their participation gave an appearance of legitimacy to the carpet yarn transactions.

41.

Hunter Transport and ConAgra employees knew that the bills of lading evidenced more yarn than was actually shipped. In fact Hunter Transport employees often accepted numerous bills of lading for each shipment. ConAgra employees frequently were told to move a load of yarn on and off the same truck several times in a single day to make it appear as if more yarn was being moved than what actually existed.

42.

Furthermore, Hunter Transport and ConAgra employees were instructed not to check the shipments to verify that the bills of lading were accurate.

43.

By November 1990, Hunter Transport and ConAgra stopped shuttling yarn altogether and thereafter only processed paperwork showing phony shipments of yarn among the other defendants and use of the ConAgra warehouse to store yarn. Michael Rigsby ("Rigsby"), the manager at the ConAgra warehouse, testified that in the fall of 1990, "[t]he trucks weren't coming in for us to unload product. [Instead, the defendants] brought us information where they wanted a bill of lading." Rigsby Depo. at 83.

44.

John Rhea ("Rhea"), who worked for Hunter, signed 708 bills of lading showing shipments of yarn after November 1990 and yet admitted that he used a personal vehicle for his trips and "never hauled any product." Rhea Depo. at 9.

E. *The Kevlar and Industrial Yarn Schemes*

45.

There were two other fraudulent schemes involving Lippincott and Ellen Lee which were initiated by Smith, one involving Kevlar and the other involving industrial yarn. The Kevlar scheme involved the use of phony documents to make it appear as if DuPont was selling Kevlar to Sun Fibres which would then process the Kevlar and sell it to Mitsubishi, which, through Lippincott and Ellen Lee, would sell it to third parties. The Kevlar never existed.

46.

Smith was also buying industrial yarn and selling it to Mitsubishi which would sell it to third parties. Smith tetified that some of these industrial yarn transactions were phony and also that he misrepresented to Mitsubishi what "processing" was being performed by Sun Fibres.

47.

The Jones and Lee Defendants, as well as Lippincott and Ellen Lee, benefitted from these schemes because the schemes created additional cash flow to perpetuate the phony carpet yarn transactions.

F. *Lippincott's And Ellen Lee's Manipulation of Mitsubishi's Controls*

48.

Lippincott and Ellen Lee used their positions as manager and deputy manager of the Atlanta Textile Trading Department to conceal the phony transactions and took kickbacks from Smith totalling almost $7 million. Some of these payments were made via wire transfer from Sun Fibres to Lippincott; others were made by checks which Smith mailed to Lippincott and Ellen Lee.[12]

49.

Of the 15 internal controls in place at the Mitsubishi Atlanta branch relating to these carpet yarn transactions, the defendants, especially Lippincott and Ellen Lee, circumvented all but two of the controls.[13]

50.

Lippincott initially conducted all negotiations to establish Mitsubishi's relationship with the Jones and Lee Defendants and Sun Fibres. He signed both the purchase contracts for the "purchases" by Mitsubishi from Sun

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[12] Smith initially paid the kickback directly to Lippincott. Later, he began making checks payable to "Lippincott and Associate," an account set up by Lippincott and Ellen Lee.

[13] Lippincott and Ellen Lee did not circumvent either the requirement that all trade lines of credit be prepared by the general manager—with approval from the New York credit division for those applications over $200,000—and the requirement that limits for letter of credit be set in advance, in writing, with the bank.

Fibres as well as the sales contracts for the "sales" by Mitsubishi to the Jones and Lee Defendants.

51.

Lippincott also negotiated with C&S to open a letter of credit for Sun Fibres. Ellen Lee was the contact person at Mitsubishi for the C&S letter of credit.

52.

Ellen Lee controlled day-to-day communications with the defendants and was routinely in contact with the Jones and Lee Defendants. Ellen Lee also monitored the payments from Cardinal to Mitsubishi.

53.

Ellen Lee, who controlled entries in the trade computer system concerning the carpet yarn sales, circumvented one of the accounting controls by instructing her subordinate, Laura Kelly ("Kelly"), not to transfer from the trade computer system to the accounting department the information on the Mitsubishi's invoices concerning sales to the Jones and Lee Defendants until the Jones and Lee Defendants paid for the yarn.

54.

In this way, the sales to the Jones and Lee Defendants did not appear as accounts receivable until the Jones and Lee Defendants were ready to make a payment and the defendants therefore concealed from Mitsubishi that the Jones and Lee Defendants had substantially exceeded their approved trade credit line. By May of 1991, the Jones and Lee Defendants were approximately $38 million behind in payments although the approved credit line was only $700,000 for Cardinal and $700,000 for General.

55.

Ellen Lee never made a concerted effort to collect the $38 million owed by Cardinal. In fact, when Ellen Lee asked Kelly to contact Cardinal in an attempt to collect the accounts receivable in May of 1991, Ellen Lee did not instruct Kelly to demand payment from Cardinal of the $38 million owed. Instead, Laura Kelly was told to simply ask "when [Mitsubishi] would be receiving a check." Kelly Depo. at 68-70.

56.

After January 1, 1991, Ellen Lee stopped creating Mitsubishi invoices for sales to the Jones and Lee Defendants altogether and directed Kelly to send the Jones and Lee Defendants a document Ellen Lee called a "shipping release." The shipping release was not a Mitsubishi form document but was a form created by Ellen Lee on her own personal computer which was not linked to the trade computer system. Ellen Lee prevented the accounting department from receiving information on these shipping releases concerning the purported sale of carpet yarn to the Jones and Lee Defendants because no invoices were entered into the trade computer system or recorded as accounts receivable.

57.

Ellen Lee also ordered Kelly to remove from the trade computer system approximately 100 invoives which represented phony carpet yarn transactions when Mitsubishi began investigating the carpet yarn transactions in May 1991.

58.

Mr. Noma never knew that Ellen Lee and Lippincott were not sending invoice and sales information concerning the Jones and Lee Defendants to the accounting department.

59.

In conjunction with the manipulation of the trade computer system, Ellen Lee avoided the Mitsubishi "lock box" procedure to help conceal from Mitsubishi the amount of money owed by the Jones and Lee Defendants.

60.

The Mitsubishi lock box procedure requires Mitsubishi customers of the Atlanta branch to make payments for commodities directly to a specified Mitsubishi account at C&S.

61.

In total disregard of the lock box procedure, Ellen Lee had the Jones and Lee Defendants mail payments in furtherance of the fraud directly to her. After receiving the money, Ellen Lee would redirect the money to the lock box and have Kelly transfer a specific number of invoices from the trade computer system to the accounting department to match the payment. Ellen Lee then sent to the accounting department a form which she had created instructing the accounting department to use the Jones and Lee Defendants' payment, which was in the lock box by then, to satisfy specified invoices. By this method, Ellen Lee knew how much money the Jones and Lee Defendants were paying before the money went to the lock box and she was therefore able to make it appear as if the Jones and Lee Defendants were making timely payments.

62.

Mr. Noma was not aware of Ellen Lee's circumvention of the lock box procedure.

63.

Lippincott and Ellen Lee also manipulated Mitsubishi's controls by creating new accounts for nonexistent companies.

64.

Lippincott and Ellen Lee used these nonexistent companies to create additional credit lines for the Jones and Lee Defendants. By using new companies, Lippincott and Ellen Lee avoided further increases to the accounts receivables for the Jones and Lee Defendants while at the same time allowing defendants to continue obtaining more money from Mitsubishi.

65.

The Jones and Lee Defendants knew that Lippincott and Ellen Lee created these fake companies on their behalf and made payments to the accounts for these nonexistent companies. Eventually, Robert Lee admitted to other Mitsubishi officials that the accounts for the fake companies were created for the benefit of the Jones and Lee Defendants.

G. *Misrepresentations of Lippincott, Ellen Lee, and Robert Lee During Investigation*

66.

Lippincott, Ellen Lee, and Robert Lee continued to make misrepresentations during Mitsubishi's investigation of the carpet yarn transactions which began in mid-1991, after Shoichiro Nagai ("Mr. Nagai") came to Atlanta in March 1991 to replace Mr. Noma as the general manager of the Atlanta branch.

67.

Mr. Nagai first suspected an unexpected surplus of carpet yarn inventory in March 1991 because of the conversations he had with Lippincott concerning the carpet yarn transactions and soon thereafter asked Lippincott to supply him with weekly written inventory reports. In the first report, Lippincott represented to Mr. Nagai that Mitsubishi had $7.8 million in carpet yarn inventory when,

in fact, there was no inventory because the yarn evidenced in the sales was nonexistent.

68.

About the same time, Mr. Nagai made a trip to New York at which time he discovered that, according to the accounting department, Mitsubishi should only have had $2.5 million in carpet yarn inventory—$5.3 million less than what Lippincott had represented to him in his report.

69.

Mr. Nagai then asked the accounting manager at the Atlanta branch, Barbara Bates ("Bates"), to compare the amount of yarn Mitsubishi purchased from Sun Fibres to the amount it had sold to the Jones and Lee Defendants. Bates' analysis showed a discrepancy of $37-38 million between what Mitsubishi had paid Sun Fibres and what the Jones and Lee Defendants had paid Mitsubishi.

70.

When questioned, Lippincott reported that this amount represented inventory that was held by Mitsubishi. He sent a memo to Mr. Nagai stating that he planned to reduce the $37-38 million inventory by $5 million per week.

71.

Thereafter, Mr. Nagai along with two other Mitsubishi employees visited ConAgra's warehouse to view the $38 million inventory of yarn. During this May 21, 1991 visit to the warehouse, Rigsby, the manager, refused to let them see the inventories of yarn, stating that the inventories were in the name of Sun Fibres. Eventually, Rigsby let Mr. Nagai and the others in the warehouse at which time Mr. Nagai did not see any carpet yarn inventory.

72.

After visiting the ConAgra warehouse, Mr. Nagai contacted the New York office which initiated in internal investigation. The investigation initially revealed that Ellen Lee had manipulated the accounting controls to conceal "sales" of $38 million of carpet yarn to the Jones and Lee Defendants. At this point, Mitsubishi did not know that most of the yarn was nonexistent.

73.

When it learned that the Jones and Lee Defendants owed $38 million to Mitsubishi, Mitsubishi immediately attempted to secure payment from the Jones and Lee Defendants. Mr. Nagai and others met with Robert Lee to ask that he pay back the amount owed. During this meeting, Robert Lee confirmed that Lippincott and Ellen Lee had set up the fake accounts for the benefit of the Jones and Lee Defendants in order to increase their credit limits. Robert Lee signed a security agreement agreeing to pay the debt of the companies and acknowledged in writing owing Mitsubishi $20,678,272.70 on account. Robert Lee also initialed lists of unpaid invoices. By signing this security agreement and initialling the lists, Robert Lee misrepresented to Mitsubishi that the Jones and Lee Defendants received yarn when in fact the yarn did not exist.

74.

As part of the investigation, Mitsubishi officials also set up a meeting with Smith on May 24, 1991. At the end of this meeting, Smith told Mitsubishi officials that he had a strong relationship with DuPont because he was paying "benefits" to DuPont employees.[14] Mitsubishi suspended business with Sun Fibres except as to the out-

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[14] As noted above, the Court credits Brum's testimony that Smith's statement regarding "benefits" was in language that did not unduly concern Brum.

standing industrial yarn contracts for export customers and payment to Sun Fibres for Kevlar which Mitsubishi understood had already been delivered.

75.

Mitsubishi became aware of the fraud by defendants when, on June 19, 1991, Ellen Lee surrendered and Lippincott was arrested by the Federal Bureau of Investigation and charged with violations of 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), and §§ 1956 and 1957 (money laundering). On July 3, 1991, Mitsubishi filed this suit against the defendants.

H. *The Flow of Mitsubishi Money*

76.

Mitsubishi's cash loss from the phony transactions was $50,112,596.

77.

Sun Fibres obtained over $178 million from Mitsubishi through draws on the letter of credit and payments by check. Sun Fibres paid over $105 million to its purported carpet yarn suppliers, the PSI Defendants, Fibertex, United General, and Classic Sales, who in turn passed $86.6 million to Consolidated.[15]

78.

General received $89.2 million, most of it from Consolidated, and passed $81.6 million to Cardinal.

79.

Cardinal in turn passed $75.7 million of Mitsubishi's money back to Mitsubishi in purported payment of yarn it had purchased. The purpose of passing money back

[15] Sun Fibres also returned $45 million to Mitsubishi and used $20 million to purchase industrial yarn.

to Mitsubishi was to induce Mitsubishi to continue to engage in the yarn transactions and to conceal the fact that no yarn existed.

80.

Each defendant took a "cut" of Mitsubishi's money as it passed around the circle. In total, the defendants "retained" [16] over $42 million.[17]

81.

The Jones and Lee Defendants together retained over $20 million of Mitsubishi funds; General retained $8.3 million, Cardinal retained $4.6 million, Consolidated retained $6.2 million, Classic Sales retained $97,000, and United General retained $1.1 million.

82.

Lippincott and Ellen Lee obtained almost $7 million of Mitsubishi funds from Smith.[18]

I. *Mitsubishi's Constructive Trust Over Money Retained by Defendants*

83.

The over $27 million retained by the Jones and Lee Defendants, Lippincott, and Ellen Lee was used for personal expenditures and to purchase automobiles, jewelry, antiques, houses, and other real and personal property.

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[16] The amount "retained" by defendants in this context means the amount the defendants did not immediately pass along to other co-conspirators. Much of this money has not been permanently "retained" by defendants but instead has been spent or sometimes invested in assets that are part of Mitsubishi's constructive trust.

[17] Another $8 million was spent trying to keep the industrial yarn scheme afloat. The $42 million retained by defendants combined with $8 million spent on the industrial yarn scheme equals Mitsubishi's total cash loss of approximately $50 million.

[18] The amount retained by Lippincott & Associate was for the benefit of both Lippincott and Ellen Lee.

84.

Jones and Robert Lee discussed the concealment of their assets in the spring of 1991.

85.

According to the Receiver's Report of June 25, 1992, the Lee Defendants have approximately $12 million and the Jones Defendants have approximately $4 million in assets. Thus, they have dissipated Mitsubishi's funds because the Lee and Jones Defendants received over $20 million.

86.

Through investigation, Mitsubishi has been able to trace some of its misappropriated funds into various assets of the Jones and Lee Defendants.

87.

In May of 1991, Robert Lee purchased a condominium in Destin Surfside, Florida. He paid $146,269.47 in cash for this condominium with Mitsubishi funds. Robert Lee received the money from General which in turn received the money from Consolidated which received the money from United General which received it from Sun Fibres which ultimately received the money from Mitsubishi.

88.

In August 1990, Robert Lee purchased an office building at 615 Glenwood Place in Dalton. The down payment of $13,844 on this building as well as at least three mortgage payments of $2,315 each—on May 8, 1991; May 20, 1991; and June 21, 1991—were paid with misappropriated Mitsubishi funds.

89.

The money used to pay for this office building was paid out of the account of United Properties. United

Properties is the name of the partnership of Robert Lee, Jones, Lippincott, and Ellen Lee. Robert Lee, Jones, Lippincott, and Ellen Lee also opened a bank account which received money from United Properties.

90.

Jones paid for two Jaguars with Mitsubishi funds. In November 1989, Jones purchased a 1990 Jaguar for $56,004.58, paying with a check from a Consolidated account. This money was traced to the PSI Defendants who received the money from Mitsubishi. Likewise, a similar transaction occurred in October 1990 when Jones paid $62,474.34 for a 1991 Jaguar on a Consolidated account.

91.

There is a strong correlation between the real estate purchases of the Lee Defendants from 1989 through 1991 and both (1) the number of phony yarn sales and (2) the amount of money taken from Mitsubishi over the same period.

J. *Defendants' Invocation of the Fifth Amendment*

92.

In the face of the compelling evidence demonstrating the fraud, the Lee and Jones Defendants, Lippincott, and Ellen Lee have repeatedly invoked the Fifth Amendment, the Lee and Jones Defendants citing the Government's stated intention to indict them.[19]

93.

Robert Lee invoked the Fifth Amendment many times during his deposition, including when he was asked about

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[19] Mitsubishi was not able to depose Jones because of illness. However, counsel for Charles Jones have stipulated that Jones would have invoked the fifth amendment had he been deposed.

his assets, how much money he obtained from Mitsubishi, and about the carpet yarn transactions.

94.

Many of those who worked for the Jones and Lee Defendants also invoked the Fifth Amendment including Ron Lee and Linda Hackney for the Lee Defendants, and Ruthie Pickens, Rhonda Parsons, and Stephen Todd Jones, Jones' son, for the Jones Defendants. Stephen Todd Jones had power of attorney for Jones.

95.

Hunter, the president of Hunter Transport, also invoked the Fifth Amendment during his deposition testimony concerning the use of his trucks and personnel for furthering the phony carpet yarn transactions.

96.

Smith has turned himself in to the United States authorities for his involvement in the carpet yarn scheme and has pled guilty to mail fraud, wire fraud, and conspiracy.

97.

Lippincott and Ellen have each pled guilty to mail fraud, wire fraud, and conspiracy.

II. CONCLUSIONS OF LAW

1.

To the extent that any findings of fact are deemed to be conclusions of law, they are hereby incorporated into these conclusions of law. To the extent that any of these conclusions of law are deemed to be findings of fact, they are incorporated into the findings of fact.

A. *Negative Interferences.*

2.

In light of the substantial evidence that the Jones and Lee Defendants were conspirators and the key architects in the scheme to defraud Mitsubishi, that they intentionally and repeatedly deceived Mitsubishi with regard to the yarn transactions, that as a direct result of their fradulent activities approximately $50 million was misappropriated from Mitsubishi, and that the Jones and Lee Defendants retained over $20 million of Mitsubishi's money, the Jones and Lee Defendants' repeated invocations of the Fifth Amendment warrant an inference that the information, if provided, would prove unfavorable. *See Baxter v. Palmigiano,* 425 U.S. 308, 318 (1976); *Lefkowitz v. Cunningham,* 431 U.S. 801, 808 (1977); *Federal Savings & Loan Insurance Corp. v. Dixon,* 835 F.2d 554, 566 (5th Cir. 1987). The Court further infers from the Jones and Lee Defendants' invocation of the Fifth Amendment that if they had testified, their testimony would have corroborated, not contradicted, the evidence presented by Mitsubishi at the preliminary injunction hearing.

3.

In light of the substantial evidence that Lippincott and Ellen Lee were conspirators and key architects in the scheme to defraud Mitsubishi, that they accepted kickback payments totalling almost $7 million from Smith, that they manipulated the controls at Mitsubishi to conceal the fraud, that they made repeated misrepresentations to other Mitsubishi officials concerning the carpet yarn, Kevlar, and industrial yarn schemes to defraud Mitsubishi, and that their assets were obtained, at least in part, with Mitsubishi money, Lippincott's and Ellen Lee's invocation of the Fifth Amendment warrant an inference that the information, if provided, would prove unfavorable. *Id.*

4.

The Court infers from Robert Lee's invocation of the Fifth Amendment in his response to Mitsubishi's interrogatory asking whether the inventory book had been destroyed, removed, or discarded that it was in fact destroyed. The Court also infers that the production of the inventory book would have been unfavorable to the Lee Defendants. *See Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 133 (S.D. Fla. 1987); *see also Evans v. Robbins*, 897 F.2d 966, 970 (8th Cir. 1990); *Consolidated Rail Corp. v. Nevins-Petrillo Warehouse & Distribution Systems, Inc.*, 619 F.Supp. 900, 906 (S.D.N.Y. 1983).

B. *Preliminary Injunction*

5.

The Court concludes that Mitsubishi is entitled to a preliminary injunction under its constructive trust and equitable lien theories prohibiting the Jones and Lee Defendants, Lippincott, and Ellen Lee from dissipating, transferring, pledging, encumbering, selling, disposing of, or making any other use of any money received either directly or indirectly from Mitsubishi and any property purchased with such money.[20]

1. *Preliminary Injunction Under Constructive Trust Remedy*

6.

The Court concludes that Mitsubishi is entitled to a preliminary injunction because there is (1) a substantial

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[20] Although it appears that Misubishi is also entitled to a preliminary injunction pursuant to the Georgia RICO statute, the Court need not determine this since the evidence overwhelmingly supports the issuance of a preliminary injunction under Mitsubishi's constructive trust and equitable lien theories.

likelihood that the plaintiff will prevail on its constructive trust and equitable lien theories; (2) a substantial threat that Mitsubishi will suffer irreparable injury if the injunction is not granted; (3) threatened injury to Mitsubishi outweighs threatened harm to the defendants; and (4) granting of a preliminary injunction will serve the public interest. *See E. Remy Martin & Co., S.A. v. Shaw-Ross International Imports, Inc.*, 756 F.2d 1525, 1530 n.13 (11th Cir. 1985); *Compact Van Equipment Co. v. Leggett & Platt, Inc.*, 566 F.2d 952, 954 (5th Cir. 1978).

7.

The Court concludes that there is a substantial likelihood that a constructive trust or equitable lien will be imposed on all money and other property obtained directly or indirectly by the defendants through fraud, a conspiracy to defraud, or conversion. *See Bateman v. Patterson*, 212 Ga. 284, 285 (1956); *First National Bank of Cartersville v. Hill*, 412 F.Supp. 422, 425 (N.D.Ga. 1976); *ITT Community Development Corp. v. Barton*, 457 F.Supp. 224, 230 (M.D.Fla. 1978); *Gibbs v. Miller & Co.*, 161 Ga. 698, 709-10 (1926); *Adams v. McGehee*, 211 Ga. 498, 501-02 (1955).

8.

The Court concludes that (1) the defendants committed fraud through concealments and misrepresentations of material facts which were made either with knowledge of the falsity or with recklessness as to their falsity; (2) the concealments and misrepresentations were made with an intent to induce Mitsubishi to act on such representations and concealments; and (3) the fraud resulted in a loss to Mitsubishi of approximately $50 million.[21] *De-*

[21] Reasonable reliance on the misrepresentations is not an element of Mitsubishi's fraud claim because (1) Lippincott and Ellen Lee, two members of the conspiracy, were fiduciaries of Mitsubishi and (2) defendants committed egregious fraud. Nevertheless, the Court concludes that Mitsubishi acted reasonably under the circumstances.

Long Equipment Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1519-20 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990); *Wolfe v. Chrysler Corp.*, 734 F.2d 701, 703 (11th Cir. 1984); *see also* O.C.G.A. §§ 51-6-1 to 51-6-2 (Michie 1982).

9.

Defendants concealed from Mitsubishi that the carpet yarn which Mitsubishi paid for was nonexistent in 93 percent of the transactions. Defendants misrepresented through documents, particularly invoices and packing lists, that yarn existed for every transaction with Mitsubishi. The Jones and Lee Defendants, Lippincott, and Ellen Lee concealed the $38 million accounts receivable of the Jones and Lee Defendants. The Jones and Lee Defendants misrepresented to Mitsubishi who their final customers were and the fact that the Jones and Lee Defendants were making some payments to Mitsubishi for yarn which did not exist. Defendants, through Hunter Transport and ConAgra, made it appear particularly through preparation and acceptance of bills of lading that yarn was being transported and stored when in fact the yarn was nonexistent. Smith, who conspired with the Jones and Lee Defendants, Lippincott, and Ellen Lee, misrepresented who his supplier of yarn was and concealed the fact that his suppliers were the PSI Defendants, Fibertex, United General, and Classic Sales.

10.

The Court concludes that the Jones and Lee Defendants, Lippincott, and Ellen Lee engaged in a conspiracy with the other defendants to defraud Mitsubishi by misappropriating Mitsubishi funds through phony yarn transactions. Additional evidence of the conspiracy includes the yarn dinners that were attended by the Jones and Lee Defendants, Lippincott, Ellen Lee, and Smith; Ellen Lee's daily contact with the Jones and Lee Defendants; the United Properties' partnership formed by Jones, Lippin-

cott, and Ellen Lee; and Lippincott's and Ellen Lee's agreement with the Jones and Lee Defendants to conceal the $38 million accounts receivable. In furtherance of this unlawful objective, the Jones and Lee Defendants, Lippincott, and Ellen Lee made intentional and reckless misrepresentations and concealments of material facts and manipulated entries in Mitsubishi's books and records, causing the misappropriation of Mitsubishi's funds in the amount of approximately $50 million. *See generally Willson v. Appalachian Oak Flooring & Hardware Co.*, 220 Ga. 599, 608 (1965); *Alimenta (U.S.A.) Inc. v. Stauffer*, 598 F.Supp. 934, 937 (N.D.Ga 1984).

11.

The Court concludes that the Jones and Lee Defendants, Lippincott, and Ellen Lee converted Mitsubishi's money by wrongfully retaining money which rightfully belonged to Mitsubishi. The Court also concludes that Mitsubishi is entitled to recover all such misappropriated money from the Jones and Lee Defendants, Lippincott, and Ellen Lee, as well as all others who received or hold such money.[22] *See, e.g., Mitzner v. Hyman*, 175 Ga.App. 311, 312-13 (1985); *James v. Newman*, 73 Ga.App. 79, 80 (1945).

12.

The Court concludes that the Jones and Lee Defendants, Lippincott, and Ellen Lee are responsible for their own concealments and misrepresentations, as well as the concealments and misrepresentations of all the other defendants and co-conspirators. *Willson*, 220 Ga. at 608-09; *Jones v. Spindel*, 128 Ga.App. 88, 99-100 (1973).

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[22] This does not include the money paid to counsel for defendants during the course of their representation, however. *See* Order dated August 22, 1991. Mitsubishi has appealed this and subsequent orders prohibiting Mitsubishi from recovering interim attorney's fees.

13.

The Court concludes that the Jones and Lee Defendants, Lippincott, and Ellen Lee have dissipated Mitsubishi's funds and engaged in artifices and deceits designed to conceal misappropriated funds rightfully belonging to Mitsubishi and that a substantial threat exists that Mitsubishi will suffer immediate and irreparable harm if the Jones and Lee Defendants, Lippincott, and Ellen Lee are not restrained in the use of the funds. *See Hudson National Bank v. Shapiro,* 695 F.Supp. 544, 549 (S.D.Fla. 1988).

14.

The Court concludes that the injury to Mitsubishi outweighs the threatened harm to the Jones and Lee Defendants, Lippincott, and Ellen Lee resulting from the entry of a preliminary injunction. Mitsubishi will be irreparably injured if the Jones and Lee Defendants, Lippincott, and Ellen Lee are not restrained from dissipating, concealing, or otherwise transferring money rightfully belonging to Mitsubishi under its constructive trust and equitable lien theories. Furthermore, Mitsubishi has already posted a $10 million bond under the temporary restraining order to protect the defendants and therefore there is no significant potential of harm to the Jones and Lee Defendants, Lippincott, Ellen Lee, or others should the preliminary injunction be entered. *ITT Community Development Corp.*, 457 F.Supp. at 234.

15.

The Court concludes that the public interest plainly lies in favor of preventing any further loss to Mitsubishi or unlawful gain by the Jones and Lee Defendants, Lippincott, and Ellen Lee through the use of Mitsubishi's misappropriated funds. *Id.*

C. *Defense of Unjustified Reliance is Inapplicable*

16.

The defense of "unjustified reliance" is not applicable and therefore does not prevent Mitsubishi from obtaining preliminary injunctive relief.

17.

The Jones and Lee Defendants, Lippincott, and Ellen Lee cannot assert the defense of unjustified reliance with respect to Mitsubishi's common law fraud claim because Lippincott and Ellen Lee were in a fiduciary relationship with Mitsubishi.[23] Where one of the conspirators has a fiduciary relationship with the plaintiff, the defense is not available to any of the conspirators. *Alimenta (U.S.A.), Inc.*, 598 F.Supp. at 939. As stated in *Alimenta*: "As each conspirator is liable for the acts done by his or her co-conspirators, there is no justification for not invoking the 'confidential relationship exception' against all the alleged conspirators where one of the alleged conspirators had a confidential relationship with the allegedly defrauded party."[24] *Id.*

18.

Second, the Jones and Lee Defendants, Lippincott, and Ellen Lee cannot rely on the defense of unjustified reliance because they perpetrated egregious fraud. *See Tower Financial Services, Inc. v. Jarrett*, 199 Ga.App. 249, 250 (1991); *Travel Wholesale, Inc. v. Herren*, 132 Ga.App. 560, 561-62 (1974); *Smith v. Holman*, 117 Ga.App.

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[23] A fiduciary relationship exists because Lippincott and Ellen Lee were agents of Mitsubishi. O.C.G.A. § 23-2-58 (Michie 1982).

[24] This holding is consistent with the general principle that a fiduciary may not assert a defense of negligence or lack of diligence. *See Alimenta (U.S.A.), Inc.* 598 F.Supp. at 938; *see also Hubbard v. Stewart*, 651 F. Supp. 294, 299 (M.D.Ga. 1987); *Harrison v. Harrison*, 214 Ga. 393, 394 (1958); *see generally Everman National Bank v. United States*, 756 F.2d 865, 869 (Fed. Cir. 1985).

248, 249 (1968);[25] *see generally Cheney v. Powell*, 88 Ga. 629, 634 (1892).

19.

In any event, the Court concludes that Mitsubishi reasonably relied on the representations made in this case. The fraud involved a conspiracy of numerous parties, all of whom were actively involved in deceiving Mitsubishi and all of whom substantiated one another's misrepresentations, adding to the perceived credibility of one another. While the Lee and Jones Defendants were making misrepresentations to Mitsubishi, Ellen Lee and Lippincott, the insiders at Mitsubishi, assured Mitsubishi that the transactions were legitimate and actively concealed the fraud. At the same time, Smith was presenting fraudulent documents to the bank in order to draw upon Mitsubishi's letter of credit—documents which appeared legitimate and were accepted by the bank. ConAgra generated fraudulent bills of lading purporting to show that yarn was in fact being transported to and from its warehouse when this was not true. Hunter Transportation accepted, delivered, and signed bills of lading showing the shipment of yarn when none was being shipped.

20.

The Court also concludes that Mitsubishi reasonably relied on the Jones and Lee Defendants, Lippincott, and Ellen Lee and other conspirators and was not required to exhaust all means of ascertaining the truth before relying upon representations. *See, e.g., DeLong Equipment Co.*, 887 F.2d at 1520; *Funding Systems Leasing*

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[25] In *Smith v. Holman*, the defendants conspired to induce the plaintiff to pay $36,000 for nonexistent storage tanks. Similarly, in the instant case, the Jones and Lee Defendants, Lippincott, and Ellen Lee conspired with the other defendants to induce Mitsubishi to pay for nonexistent yarn. As a result, Mitsubishi has been defrauded of approximately $50 million. The Lee Defendants therefore cannot defend their acts of gross fraud by claiming that Mitsubishi did not exercise due diligence.

Corp. v. Pugh, 530 F.2d 91, 94 (5th Cir. 1976); *Braselton Bros., Inc. v. Better Maid Dairy Products, Inc.*, 222 Ga. 472, 475 (1966); *Elliott v. Marshall*, 179 Ga. 639, 640 (1934).

D. *Defense of Unclean Hands is Without Merit*

21.

The Court concludes that the defense of unclean hands is without merit for several reasons.

22.

First, the alleged "benefits" paid to DuPont by Smith never occurred because Smith was never doing business directly with DuPont.

23.

Second, Mitsubishi never acted improperly or with "unclean hands." No Mitsubishi officials were aware of the alleged "benefits" until May 24, 1991, very shortly before the fraud was exposed.

24.

Third, the Jones and Lee Defendants, Lippincott, and Ellen Lee fail to show how Mitsubishi's alleged knowledge of Smith's purported payments of "benefits" affected the relationship between Mitsubishi and the Jones and Lee Defendants, Lippincott, or Ellen Lee or that such alleged knowledge injured the Jones and Lee Defendants, Lippincott, or Ellen Lee. "The alleged wrongdoing of the plaintiff does not bar relief unless the defendant can show that *he has personally been injured* by the plaintiff's conduct." *Mitchell Bros. Film Group v. Cinema Adult Theatre*, 604 F.2d 852, 863 (5th Cir. 1979) (citing *Lawler v. Gilliam*, 569 F.2d 1283, 1294 (4th

Cir. 1978)) (emphasis added), *cert. denied,* 445 U.S. 917 (1980).[26]

25.

Fourth, the unclean hands doctrine does not apply because the nonexistent payments of "benefits" to DuPont employees do not directly relate to the fraud which was committed by the Jones and Lee Defendants, Lippincott, and Ellen Lee. The payment of "benefits" never occurred and Smith never did business with DuPont. The Jones and Lee Defendants knew that Smith was not purchasing yarn from DuPont and, therefore, the allegation that Smith told Mitsubishi officials that he paid "benefits" to DuPont employees has no relation to the fraud which the Jones and Lee Defendants, Lippincott, and Ellen Lee were perpetrating on Mitsubishi. *See Adams v. Crowell,* 157 Ga.App. 576, 577 (1981).

III. CONCLUSION

The Court GRANTS IN PART and DENIES IN PART Mitsubishi's motion to have a preliminary injunction entered against Lippincott and Ellen Lee pursuant to Local Rule 220-1(b)(1) [#481-1], GRANTS Ellen Lee's motion to adopt the briefs of the Jones and Lee Defendants, and, in light of the Court's findings of fact and conclusions of law, GRANTS Mitsubishi's motion for a preliminary injunction [#2-2] and DENIES as moot Mistubishi's motion to amend the Receivership Order [#482-1]. Accordingly, the Court HEREBY ENJOINS the Jones and Lee Defendants, Lippincott, and Ellen Lee from dissipating, transferring, pledging, encumbering, selling, disposing of, or making any other use of any money received either directly or indirectly from Mitsubishi or any property purchased with such money.

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[26] The court in *Mitchell Bros.*, 604 F.2d at 863, went on to state that "[t]he doctrine of unclean hands 'does not purport to search out or deal with the general moral attributes . . . of [the] litigant.'" (quoting *NLRB v. Fickett-Brown Mfg. Co.*, 140 F.2d 883, 884 (5th Cir. 1944)).

IT IS SO ORDERED, this 23 day of October, 1992.

/s/ Marvin H. Shoob
MARVIN H. SHOOB
Senior Judge
United States District Court
Northern District of Georgia

[Filed Feb. 14, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 1-91-CT-1510-MHS

MITSUBISHI INTERNATIONAL CORPORATION,
Plaintiff,

v.

CARDINAL TEXTILE SALES, INC., GENERAL SALES & LEASING CO., UNITED MARKETING, INC., CLASSIC SALES, INC., CONSOLIDATED TRADING CO., FIBERTEX TEXTILE SUPPLIERS, INC., PURVIS-SIKKELEE INTERNATIONAL LTD., SKEIN DYERS OF AMERICA, INC., SUN-FIBRES, INC., RAYMOND P. LIPPINCOTT, III, MARY ELLEN LEE, CHARLES W. JONES, ROBERT E. LEE, WILLIAM J. PURVIS, WILLIAM L. SIKKELEE, JOSEPH L. SMITH,

Defendants.

ORDER

This matter has come before the Court on an Application for Compensation filed by Counsel for Defendants Fibertex Textile Supplies, Inc. and Hershel Nunley ("Movants"). After reviewing the Application for Compensation along with the attachments thereto:

IT IS ORDERED that these parties shall be permitted to pay reasonable counsel fees and expenses for their defense of this action. The invoices submitted for the months of November and December, 1991 are hereby approved. Counsel for these parties shall submit further interim bills to the Court for approval; and

IT IS FURTHER ORDERED, that, any funds paid to the attorneys pursuant to this Order are hereby released from any restraint or constructive trust, and Plaintiff shall not seek to have them disgorged, repaid, or refunded at any time;

IT IS FURTHER ORDERED, that the original and one copy of the APPLICATION FOR ALLOWANCE OF REASONABLE DISBURSEMENTS TO COUNSEL FOR DEFENDANTS FIBERTEX AND NUNLEY, as filed in the Clerk's office, shall be sealed by the Clerk. Copies served on other counsel may be served without attached exhibits and subsequent applications for funds shall likewise be sealed by the Clerk.

IT IS FURTHER ORDERED that this Court's July 3, 1991 Order, as amended, and the Consent Order as to Movants and Plaintiff, of December 3, 1991, remain in full force and effect, except as altered by the above provisions; and

IT IS FURTHER ORDERED, that this Court retains jurisdiction of this matter for all purposes including amending and enforcing this Order.

IT IS SO ORDERED, this 18th day of December, 1991.

/s/ Marvin H. Shoob
MARVIN H. SHOOB
Judge
United States District Court
Northern District of Georgia
Atlanta Division

[Filed Oct. 1, 1991]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 1:91-cv-1510-MHS

MITSUBISHI INTERNATIONAL CORPORATION,
Plaintiff,

v.

CARDINAL TEXTILE SALES, INC., *et al.*,
Defendants.

ORDER

After carefully reviewing the applications for attorney's fees of counsel for defendants Robert E. Lee, General Sales & Leasing Co., and Classic Sales, Inc. and counsel for defendants Charles W. Jones, Cardinal Textile Sales, Inc., United Marketing, Inc., and Consolidated Trading Co., and upon the recommendation of William H. Runge, III, the temporary receiver for the aforementioned defendants, the Court APPROVES the aforementioned applications and DIRECTS Mr. Runge to pay the following for services rendered during July and August 1991:

(1) $7,031.00 to Altman, Kritzer & Levick;

(2) $88,525.00 to Kutak, Rock & Campbell; and

(3) $24,185.01 to Schulten & Ward.[1]

In addition, after carefully reviewing the application for attorney's fees of counsel for defendants Purvis-Sikkelee,

[1] These amounts reflect the balance owed after deducting from the total the monies already paid to counsel by their clients in the form of a retainer.

International, Ltd., Skein Dyers of America, Inc., William J. Purvis, and William L. Sikkelee, the Court, having been advised that counsel has been paid a retainer of $250,000, APPROVES the "drawing down" of $94,989.99 by Kinney, Kemp, Pickell, Sponcler & Joiner for services rendered during July and August 1991. Any further "draws" must also be approved by the Court.

The Court AMENDS its July 3, 1991, Order to indicate that any funds paid to counsel for defendants Purvis-Sikkelee International, Ltd., Skein Dyers of America, Inc., William J. Purvis, and William L. Sikkelee pursuant to this and any subsequent order shall be released from any restraint or constructive trust and plaintiff shall not seek to have them disgorged, repaid, or refunded at any time.

The Court will continue to review all applications for attorney's fees for duplication of time, etc. and will not approve expenses in connection with any audit without representation from counsel that an audit separate from and in addition to the one currently being performed by Coopers and Lybrand is needed.

IT IS SO ORDERED, this 30th day of September, 1991.

/s/ Marvin H. Shoob
MARVIN H. SHOOB
Judge
United States District Court
Northern District of Georgia

[Filed 8-22-91]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action 1:91-cv-1510-MHS

MITSUBISHI INTERNATIONAL CORPORATION,
Plaintiff,

v.

CARDINAL TEXTILE SALES, INC., GENERAL SALES & LEASING CO., UNITED MARKETING, INC., CLASSIC SALES, INC., CONSOLIDATED TRADING CO., FIBERTEX TEXTILE SUPPLIES, INC., PURVIS-SIKKELEE INTERNATIONAL LTD., SKEIN DYERS OF AMERICA, INC., SUN-FIBRES, INC., RAYMOND B. LIPPINCOTT, III, MARY ELLEN LEE, CHARLES W. JONES, ROBERT E. LEE, WILLIAM J. PURVIS, WILLIAM L. SIKKELEE, JOSEPH L. SMITH,

Defendants.

ORDER

This matter having come before the Court on Plaintiff's Motion for Appointment of Receiver, and the Court having conducted an evidentiary hearing on August 13 and 14, 1991, and having considered the arguments and briefs of counsel, and having found that plaintiff has shown a substantial likelihood of prevailing on its claims that assets in the possession or control of defendants named below should be impressed with a constructive trust in favor of plaintiff, and in order to marshal, protect, and preserve such assets, the Court hereby grants plaintiff's motion and orders as follows:

IT IS HEREBY ORDERED THAT William H. Runge, III, (the "Receiver"), is hereby appointed to act as temporary receiver in this matter conditioned upon plaintiff's posting a bond in the amount of ten million dollars ($10,000,000.00) for the following persons and entities ("Receiver Entities"): Cardinal Textile Sales, Inc.; General Sales & Leasing Co.; United General Marketing, Inc.; Consolidated Trading Co.; Classic Sales, Inc.; Charles W. Jones; and Robert E. Lee. The Receiver shall serve as an officer of the Court with authority as set forth below, pending final adjudication of this action or until further order of this Court. The Receiver shall have and possess full and complete authority to take all actions necessary or advisable to investigate, operate, and manage the businesses of the Receiver Entities and to efficiently locate, protect, and preserve all assets in the possession or control of the Receiver Entities. Such authority shall be commensurate with, and shall temporarily displace, the authority possessed by each Receiver Entity (or agent of a Receiver Entity) with respect to his or its assets and businesses prior to and after entry of the Court's July 3, 1991 Order in this action. Such authority shall include but not be limited to authority to:

(1) Perform the accounting required under the Court's July 3 and July 12, 1991, Orders in this action and provide an interim accounting before September 12, 1991.

(2) Take custody, control, and possession of all funds, property, premises, leases, and other assets in the possession or under the control of each of the Receiver Entities, provided, however, that (a) any salary, income, gift, or inheritance acquired after the date of this order by Charles W. Jones or Robert E. Lee from sources other than the Receiver Entities or receivership properties shall be reported to the Receiver but shall not otherwise be subject to this order, unless acquired through fraud or chicanery; and (b) with respect to the primary residences of Charles W.

Jones and Robert E. Lee, the Receiver shall make an inventory of the contents of such residences (at a reasonable time upon notice to counsel for Jones and Lee), but shall not remove such contents or order the inhabitants thereof to vacate the premises, except upon order of the Court.

(3) Manage, control, operate and maintain the Receiver Entities, and pay legitimate ordinary and customary business operating expenses related thereto.

(4) Use income, earnings, rents, profits, and funds of the Receiver Entities to preserve and protect the assets of the Receiver Entities and proceeds therefrom.

(5) Engage and employ others, including but not limited to consultants, attorneys, accountants, experts, and employees to assist him in his duties and to pay them for their services in reasonable amounts to be approved by the Court.

(6) Upon notice to counsel for plaintiff and the Receiver Entities and approval of the Court, pursue, resist, and defend all suits, actions, claims, and demands which may now be pending or which may be brought or asserted against the Receiver Entities, with the exception of this action and any proceeding related hereto.

(7) Open bank accounts in the name of the Receiver on behalf of the Receiver Entities.

(8) Inspect and copy documents affecting a Receiver Entity's assets or businesses, whether such documents be in the possession of Receiver Entities or others, provided that this paragraph shall not be construed to require the waiver by any person of any privilege.

(9) Encumber or sell assets when necessary to protect the assets or investment of a Receiver Entity.

(10) Discuss matters pertaining to a Receiver Entity's assets and businesses with others who may have knowledge of such matters. The Receiver shall use discretion in discussing confidential matters with others, and shall have due regard for the August 14, 1991, Protective Order Regarding Confidential Documents entered in this case.

(11) Collect and preserve amounts owed to any of the Receiver Entities.

(12) Said Receiver shall provide a monthly written accounting of income and expenses to this Court for each of the Receiver Entities, with copies to plaintiff and the Receiver Entities as well as any other reports required by the Court as the Court shall direct; Receiver shall apply to the Court for instructions whenever necessary.

(13) Receive, read, and respond to mail addressed to any of the Receiver Entities, with the exception of confidential attorney-client correspondence. The Receiver shall read no more of any personal correspondence than is necessary to determine whether the correspondence contains information relative to his responsibilities.

(14) Take such other actions as appropriate to carry out the terms of this order; and

IT IS FURTHER ORDERED that except as authorized by the Receiver, no person holding or claiming a position as an officer, director, employee, agent, or shareholder of any of the Receiver Entities shall possess any authority to exercise any rights or powers of such position or to act in regard to any of the existing business affairs of the Receiver Entities; and

IT IS FURTHER ORDERED that the Receiver is entitled to reasonable compensation, and shall be paid for his services and expenses and the services of those

persons engaged and employed by him in his capacity as Receiver, as directed by further order of the Court; and

IT IS FURTHER ORDERED that defendants, the Receiver Entities, and their respective agents, servants, employees, and entities under their control shall co-operate with and assist the Receiver and shall take no action, directly or indirectly, to hinder, obstruct, or otherwise interfere with the Receiver in the performance of his duties. The Receiver shall provide to the Receiver Entities and their respective attorneys reasonable access to the books, records, and other papers of the Receiver Entities and, if appropriate, to the information gained by the Receiver upon request and to the same extent as such is provided to plaintiff. This paragraph shall not be construed to require the waiver by any person of any privilege; and

IT IS FURTHER ORDERED that, except by leave of this Court, during the pendency of this Receivership all creditors and other persons seeking money damages or other relief from any Receiver Entities, with the exception of plaintiff, and all others acting on their behalf, including sheriffs, marshals, and all officers and deputies, and their respective attorneys, servants, agents, and employees, are hereby stayed and restrained from doing anything to interfere with the possession, recovery, or management by the Receiver of the property and assets owned, controlled, belonging to, or in the possession of any of the Receiver Entities, or to interfere with the Receiver in any manner during the pendency of this proceding; and

IT IS FURTHER ORDERED that the Receiver is authorized to register this order with appropriate government offices and courts and to serve this order on any person he reasonably believes to be in control of funds or other assets of any Receiver Entity; and

IT IS FURTHER ORDERED that for the thirty-day period following the date of this order, defendants Charles W. Jones and Robert E. Lee each shall be permitted to

spend four thousand dollars ($4,000.00) for personal living expenses, in addition to (1) any medical expenses which they or any family member living in their respective households may incur, and (2) any taxes, insurance, mortgage and car payments, which expense amount shall promptly be paid by the Receiver after his appointment from their respective funds in his possession. Within twenty-five (25) days of such appointment, the Receiver shall determine the amount of future monthly living expenses allowed for Jones and Lee, and shall promptly provide notice to counsel for Jones, Lee, and plaintiff of such determination. Payment of such future living expenses must be approved by the Court; and

IT IS FURTHER ORDERED that the Receiver Entities shall be permitted to pay reasonable counsel fees and expenses for their defense of this action. Invoices for such fees and expenses shall be submitted to the Receiver on a monthly basis and the Receiver shall review such invoices and submit them with his recommendation to the Court for approval; and

IT IS FURTHER ORDERED that any funds paid to the attorneys for the Receiver Entities pursuant to this order shall be released from any restraint or constructive trust and plaintiff shall not seek to have them disgorged, repaid, or refunded at any time; and

IT IS FURTHER ORDERED that, in addition to the powers set forth herein, the Receiver shall have all of the powers of a receiver authorized by law except as they may be inconsistent with the terms of this order; and

IT IS FURTHER ORDERED that the Court's July 3, 1991, Order, as amended, remains in full force and effect except as altered by the above provisions; and

IT IS FURTHER ORDERED that this Court retains jurisdiction of this matter for all purposes including amending and enforcing this order.

IT IS SO ORDERED, this 22nd day of August, 1991.

/s/ Marvin H. Shoob
MARVIN H. SHOOB
Judge
United States District Court
Northern District of Georgia

[Filed 7-3-91]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File
No. I-91-CV-1510-MHS

MITSUBISHI INTERNATIONAL CORPORATION,
Plaintiff,

v.

CARDINAL TEXTILE SALES, INC., GENERAL SALES & LEASING CO., UNITED [GENERAL] MARKETING, INC., CLASSIC SALES, INC., FIBERTEX TEXTILE SUPPLIES, INC., PURVIS-SIKKELEE INTERNATIONAL LTD., SKEIN DYERS OF AMERICA, INC., RAYMOND B. LIPPINCOTT, III, MARY ELLEN LEE, CHARLES W. JONES, ROBERT E. LEE, WILLIAM J. PURVIS, WILLIAM L. SIKKELEE,
Defendants.

ORDER

The Court has considered Plaintiff Mitsubishi International Corporation's Motion for Temporary Restraining Order, Preliminary Injunction and Other Relief, and the accompanying Brief, Complaint and Affidavits submitted therewith. It appears to the Court that Plaintiff Mitsubishi International Corporation ("Plaintiff" or "Mitsubishi") has a substantial likelihood of prevailing on the merits of one or more of its claims against Defendants; that immediate and irreparable injury, loss or damage will result to Plaintiff unless a restraining order is issued against Defendants; that the threat and injury to Plaintiff substantially outweigh any threat and harm the injunctive

relief may do the Defendants; and granting injunctive relief will serve the public interest.

It further appears to the Court that Plaintiff is entitled to an immediate equitable accounting and expedited discovery to insure that all misappropriated funds and any properties purchased therewith are accounted for[; it further appears that Plaintiffs' counsel has notified Defendants or Defendants' counsel of this hearing.] Therefore,

IT IS HEREBY ORDERED that pending a hearing on Plaintiff's Motion for Preliminary Injunction, or further Order of the Court, the Defendants, their officers, agents, servants, employees and attorneys, and all persons acting in concert with them, be and hereby are temporarily restrained from dissipating, transferring, pledging, encumbering, selling, disposing of, or making any other use of any and all monies received, directly or indirectly, from Joseph L. Smith or Sun-Fibres, Inc.; any and all monies received, directly or indirectly, as a result of yarn or fiber transactions involving Mitsubishi or Mitsubishi funds; and any and all real or personal properties purchased in whole or in part with such monies. This Order extends to all such monies wherever they may be traced and whether kept separate or commingled with other monies.

IT IS FURTHER ORDERED that Defendants, and each of them, provide to the Court and to Plaintiff's counsel on or before July 12, 1991, a full and complete accounting with respect to all monies received, directly or indirectly, from Joseph L. Smith or Sun-Fibres, Inc., and all monies received, directly or indirectly, as a result of any and all yarn and fiber transactions involving Mitsubishi or Mitsubishi funds. Such accountings shall fully account for all such monies from the time of receipt through any use or disposition of such monies, and wherever such monies may be traced. Any and all real or personal property purchased with such funds shall be described with sufficient particularity to permit the Court

to place a lien on or otherwise take direct judicial action with respect to such properties.

IT IS FURTHER ORDERED that Defendants serve by hand delivery responses to Plaintiff's First Interrogatories and Requests for Production (a representative sample of which is attached hereto) and produce all responsive documents not protected by the attorney client privilege, on or before July 12, 1991. Further, Plaintiff shall be permitted to commence third party depositions immediately.[*]

SO ORDERED, this 3rd day of July 1991.

/s/ Marvin H. Shoob
United States District
Court Judge

[* Defendants are ordered to show cause before this Court on July 18, 1991, at 1:30 p.m., why a preliminary injunction and the other relief sought in Plaintiffs' Motion should not be granted.]

[Filed April 28, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 91-8775, 91-8900

MITSUBISHI INTERNATIONAL CORPORATION,
Plaintiff, Counterclaim-Defendant, Appellant,

versus

CARDINAL TEXTILE SALES, INC.;
UNITED GENERAL MARKETING, INC.,
CLASSIC SALES, INC.,
CHARLES W. JONES and ROBERT E. LEE,
Defendants, Crossclaim-Plaintiffs, Appellees,

GENERAL SALES & LEASING CO.,
Defendant, Counterclaim-Plaintiff, Crossclaim-Plaintiff, Appellee,

FIBERTEX TEXTILE SUPPLIES, INC.,
Defendant, Crossclaim-Defendant, Crossclaim-Plaintiff,

PURVIS-SIKKELEE INTERNATIONAL, LTD.
and SKEIN DYERS OF AMERICA, INC.,
Defendants, Crossclaim-Defendants, Appellees,

RAYMOND B. LIPPINCOTT, III, *et al.*,
Defendants,

WILLIAM J. PURVIS, WILLIAM L. SIKKELEE
and CONSOLIDATED TRADING CO.,
Defendants-Appellees,

JOSEPH LEE SMITH, *et al.*,
Defendants, Crossclaim-Defendants,

HERSHEL NUNLEY, *et al.*,
Defendants, Crossclaim-Plaintiffs,

UNITED STATES OF AMERICA, *et al.*,
Movants.

No. 92-8192

MITSUBISHI INTERNATIONAL CORPORATION,
Plaintiff, Counterclaim-Defendant, Appellant,

versus

CARDINAL TEXTILE SALES, INC., *et al.*,
Defendants, Crossclaim-Plaintiffs,

GENERAL SALES & LEASING CO.,
Defendant, Counterclaim-Plaintiff, Crossclaim-Plaintiff,

FIBERTEX TEXTILE SUPPLIES, INC.,
Defendant, Crossclaim-Defendant, Crossclaim-Plaintiff,

PURVIS-SIKKELEE INTERNATIONAL, LTD. and SKEIN DYERS OF AMERICA, INC.,
Defendants, Crossclaim-Defendants, Appellees,

RAYMOND B. LIPPINCOTT, III, *et al.*,
Defendants,

WILLIAM J. PURVIS and WILLIAM L. SIKKELEE,
Defendants-Appellees,

HERSHEL NUNLEY, *et al.*,
Defendants, Crossclaim-Plaintiffs,

UNITED STATES OF AMERICA, *et al.*,
Movants.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, CARNES, Circuit Judge, and JOHNSON, Senior Circuit Judge

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. A-972

MITSUBISHI INTERNATIONAL CORPORATION,
Petitioner

v.

CARDINAL TEXTILE SALES, INC., *et al.*

ORDER

UPON FURTHER CONSIDERATION of the application of counsel for the petitioner, the response, and the reply filed thereto,

IT IS ORDERED that the order entered by the undersigned on May 20, 1994, in the above-entitled case is continued pending the timely filing and disposition by this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue pending the sending down of the judgment of this Court, or further order of the Court.

/s/ Anthony M. Kennedy
Associate Justice of the
Supreme Court of the
United States

Dated this 1st day of June, 1994.

SUPREME COURT OF THE UNITED STATES

No. A-972

MITSUBISHI INTERNATIONAL CORPORATION,
Applicant

v.

CARDINAL TEXTILE SALES, INC., *et al.*

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Eleventh Circuit, case Nos. 91-8775, 91-8900, and 92-8192, be, and the same is hereby, recalled and stayed pending the receipt of a response and further order of the undersigned or of the Court.

/s/ Anthony M. Kennedy
Associate Justice of the
Supreme Court of the
United States

Dated this 20th day of May, 1994.

Supreme Court, U.S.
FILED
AUG - 4 1994
OFFICE OF THE CLERK

NO. 94-2

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

MITSUBISHI INTERNATIONAL CORPORATION,

Petitioner,

v.

CARDINAL TEXTILE SALES, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MICHAEL K. WOLENSKY
(Counsel of Record)
SARAH E. DAY
Kutak Rock
4400 Georgia-Pacific Center
133 Peachtree Street, NE
Atlanta, GA 30303
(404) 222-4600

Counsel for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the court of appeals erred when it concluded, under the facts and circumstances of this case, that the constructive trust law of Georgia, Rule 64 of the Federal Rules of Civil Procedure, and the All Writs Act did not provide a basis for the district court to place in receivership all of the Respondents' assets to secure a possible future money judgment.

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NO. 94-2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

MITSUBISHI INTERNATIONAL CORPORATION,

Petitioner,

v.

CARDINAL TEXTILE SALES, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents General Sales & Leasing Company, Classic Sales, and Robert E. Lee ("Respondents") respectfully submit their Brief in Opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.[1]

[1] Pursuant to Supreme Court Rule 29.1, Respondents submit that they do not have any parent corporations or subsidiaries.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 14 F.3d 1507, and is reprinted at pages 1a-38a of the appendix to the petition. The relevant orders of the district court are unreported. The district court's orders are reprinted at pages 39a-89a of the petition, and at pages 1a-10a of this brief in opposition.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 9, 1994. The petition for a writ of certiorari was filed on June 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Federal Rule of Civil Procedure 64

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other

corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Federal Rule of Civil Procedure 65

(a) **Preliminary Injunction.**

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

* * * *

(d) **Form and Scope of Injunction or Restraining Order.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

STATEMENT

This case arises out of a private, contractual dispute in connection with the purchase and sale of textile yarn. Petitioner's claims include breach of contract, conversion, common law fraud, civil RICO, and other claims for money damages in connection with the underlying commercial transactions. Pet. App. 7a. Soon after the action was filed, the district court, at Petitioner's request, put all of the Respondents' assets into involuntary receivership. Pet. App. 4a.

The present interlocutory appeal arises out of several orders of the district court allowing payment of fees to Respondents' attorneys out of assets which the court had placed under the receiver's custody. Pet. App. 11a. At the outset, the court of appeals acknowledged the correctness of the Respondents' jurisdictional challenge to Petitioner's invocation of the "collateral order doctrine" but nevertheless found jurisdiction to hear the appeal by treating the district court's orders as equivalent to denials of a request for preliminary injunction. Pet. App. 16a. Thus, accepting

jurisdiction, the court of appeals affirmed the district court's orders allowing the payment of Respondents' attorneys' fees. Pet. App. 4a. The court of appeals reached this result after concluding the district court had no authority under Georgia law to impose a constructive trust or otherwise to attach the Respondents' assets. Pet. App. 4a.

In seeking further review by this Court, the issue raised by the Petitioner in the court below has undergone a remarkable transformation, bearing no resemblance to the question now presented by the Petitioner. In its decision, the court of appeals addressed the following issue: "whether the district court erred when it awarded attorneys' fees to counsel for the [Respondents] and exempted such fees from the provisions of the temporary restraining order as well as the operation of any constructive trust that might be impressed on final judgment." Pet. App. 12a. By contrast, the question now presented by Petitioner is "[w]hether federal district courts have the authority under Rule 65 of the Federal Rules of Civil Procedure and the All Writs Act, 28 U.S.C. § 1651, to issue preliminary injunctions freezing defendants' assets in order to protect a future money judgment." Pet. (i). The question now presented by the Petitioner has been fashioned from an issue meriting only footnote treatment in the court below. Pet. App. 27a-28a.

Petitioner commenced this suit in the United States District Court for the Northern District of Georgia on July 3, 1991. On that same date, the district court issued a temporary restraining order enjoining the Respondents "from dissipating, transferring, pledging, encumbering, selling, disposing of, or making any other use of any and all monies received, directly or indirectly" from Petitioner. Pet. App. 87a-89a. On August 22, 1991, the court granted the Petitioner additional equitable relief by appointing a receiver to take control of *all* of the Respondents' assets. Pet. App.

80a-86a. The appointment of a receiver was premised upon the court's conclusion that the Petitioner had demonstrated a substantial likelihood of prevailing on its claim of constructive trust. Pet. App. 80a. It had not been established, however, that all of the assets of the Respondents which were in the custody of the receiver could be traced to monies obtained from the Petitioner. Pet. App. 11a.

The receivership order granted the receiver plenary power over all of the Respondents' assets, not just those involving assets traceable to Petitioner's funds; indeed, the receiver was given "full and complete authority to take all actions necessary or advisable to investigate, operate, and manage the businesses of the [Respondents] and to efficiently locate, protect, and preserve all assets in the possession or control of the [Respondents]." Pet. App. 81a.

The receivership order utterly divested the Respondents of any participation in, or control over, their own business or financial affairs.[3] For sustenance, the order included a provision for the payment of a meager living allowance for Respondent Lee and his family. Pet. App. 84a-85a. Thus, while the Petitioner's claims for unliquidated damages have remained unadjudicated for more than three years, the Respondents' assets have remained beyond their use and control.

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[3] For example, the order directed that "no person holding or claiming a position as an officer, director, employee, agent, or shareholder of any of the [Respondents] shall possess any authority to exercise any rights or powers of such position or to act in any regard to any of the existing business affairs of the [Respondents]." Pet. App. 83a.

Also in the receivership order was a provision for the payment of Respondents' court-approved, reasonable attorneys' fees and expenses, which were to be paid out of the millions of dollars of Respondents' assets placed in the exclusive control of the receiver, and which were to be unrestricted after payment. Pet. App. 84a-85a.[4] On August 28, 1991, Petitioner noticed an appeal to the court of appeals from the provisions of the receivership order regarding attorneys' fees. Res. App. 9a-10a. The court of appeals affirmed the district court's orders. Pet. App. 4a. In affirming, however, the court of appeals also held that the district court's ruling on the issue appealed was correct because the district court had no authority under Georgia constructive trust law or Rule 64 of the Federal Rules of Civil Procedure to sequester *any* of the Respondents' assets and place them in a receivership. Pet. App. 4a.

While the appeal was pending, the case continued in the pretrial stage in the district court, and a preliminary injunction was granted by the district court on October 27, 1992, more than one year after Petitioner appealed the district court's provisions for the payment of attorneys' fees by the receiver. Pet. App. 39a-75a. Like the receivership order, the preliminary injunction was granted, in part, based upon a finding of "substantial likelihood that the [Petitioner] will prevail on its constructive trust and equitable lien

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[4] The district court ordered that the attorneys' fees were to be unrestricted after payment because there was no evidence that the assets were traceable to Mitsubishi funds. Pet. App. 11a. On December 9, 1992, the district court suspended payment of Respondents' attorneys' fees from their sequestered assets. Order in *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.* (N.D. Ga. December 9, 1992). Res. App. 1a-8a.

theories." Pet. App. 66a-67a. Although some defendants consented to the entry of the preliminary injunction, Respondents did not. Pet. App. 40a.

In rejecting Petitioner's appeal, the court of appeals' analysis was two-fold. First, the court found that Petitioner had proceeded under a "mistaken and overly rigid view of constructive trusts" under Georgia law. Pet. App. 19a. Upon a thorough review and analysis of the Georgia statutes and case law governing constructive trusts, and upon noting that the allegations in this case arose "in the context of a contractual, commercial relationship," the court of appeals concluded that the Petitioner was "not entitled to the equitable remedy of a constructive trust because it has an adequate remedy at law." Pet. App. 20a-23a.[5]

Second, setting nomenclature aside, the court of appeals recognized that the substance of the relief afforded by the district court gave force to Petitioner's strategy "to tie up all of the [Respondents'] assets while the parties litigate the . . . claims for damages outlined in the complaint," and sought to determine if some other legal basis might support the district court's action. Pet. App. 25a-26a. The unlimited seizure of all of the Respondents' assets was deemed equivalent to a prejudgment writ of attachment, a remedy expressly governed by Rule 64 of the Federal Rules of Civil Procedure. Pet. App. 27a. As no federal statute providing such relief was invoked by Petitioner, Rule 64 permits prejudgment attachment only in accordance with state law. Finding none of the requisites for attachment under Georgia law present, the court of appeals concluded that the district

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[5] Judge Carnes dissented from this ruling, opining that Petitioner would be entitled to a constructive trust under Georgia law. Pet. App. 31a-38a (Carnes, J., concurring in part and dissenting in part).

court's action could not be upheld under Rule 64. Pet. App. 28a-29a.

Notably, Petitioner incorrectly states the court's holding below. The court of appeals did not, as Petitioner asserts, hold that a "general federal rule of equity" prohibits the issuance of a preliminary injunction to prevent the dissipation of assets to protect a money judgment. Pet. 7. Rather, the court of appeals observed that "ordinarily" a court may not freeze a defendant's assets for the purpose of satisfying a potential money judgment. Pet. App. 26a. Having found no basis under either the Georgia law of constructive trusts or Rule 64 to support the district court's receivership order, the court of appeals affirmed the orders on appeal.

On March 2, 1994, Petitioner sought rehearing and suggested rehearing *en banc*. On April 28, 1994, the petition for rehearing was denied. As no member of the panel nor any other judge in regular active service requested that the court be polled on rehearing *en banc*, Petitioner's suggestion for rehearing *en banc* was also denied. Pet. App. 92a. After the court of appeals denied Petitioner's motion to stay the mandate, Justice Kennedy, acting as Circuit Justice, granted Petitioner's application in this Court for a stay of the court of appeals' mandate pending the disposition of the petition for a writ of certiorari. Pet. App. 93a.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct, is consistent with prior decisions of the Court, does not raise any conflicts among the federal courts of appeals, and resulted from an interlocutory appeal. Further review by the Court is therefore unwarranted.

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS

Petitioner's assertion that the decision of the court of appeals is inconsistent with the decisions of this Court in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940) and *United States v. First National City Bank*, 379 U.S. 378 (1965) is erroneous.

The decision below is compatible with and readily distinguishable from the Court's decision in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). The plaintiffs in *Deckert* sued under the Securities Act of 1933 (the "Securities Act"), seeking equitable relief, primarily in the form of rescission and restitution, and a temporary injunction. Unlike Petitioner, the plaintiffs in *Deckert* stated a cause of action under applicable law entitling them to the equitable relief sought. *Deckert*, 311 U.S. at 288.[6] Furthermore, the power of the district court to grant the relief provided by the Securities Act, including preliminary equitable relief, was founded upon the statutory authority in the district court "*to enforce*" a plaintiff's right to recovery under Section 22(a) of the Securities Act. *Id.* Having found that the plaintiffs were entitled to equitable relief under the Securities Act, the Court held that the temporary injunction, which had been "framed narrowly," was "a reasonable measure to preserve the status quo pending final determination of the questions raised by the bill." *Id.* at 290.

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[6] The Court in *Deckert* recognized that the Securities Act provided a "statutory right" to equitable relief. 311 U.S. at 287-88.

In stark contrast to the plaintiffs in *Deckert*, the Petitioner sought sweeping interim equitable relief in an action the court of appeals concluded was solely for money damages. As the court of appeals posed the issue, it addressed whether the district court erred in allowing the payment of Respondents' attorneys' fees out of the funds sequestered by the receivership order and exempted them from the operation of any state law constructive trust that might be entered after trial. Pet. App. 12a. The interlocutory orders under review were issued not pursuant to any federal statutory authority, but rather, on the presumed likelihood that Petitioner would prevail on its constructive trust claim. *Deckert* neither controls nor guides the decision here. The court of appeals decision is not inconsistent with the Court's decision in *Deckert*.

The decision below also is not inconsistent with *United States v. First National City Bank*, 379 U.S. 378 (1965). As in *Deckert*, the district court's authority in *First National* to grant the temporary injunction was based upon federal statutory authority. *First National*, 379 U.S. at 380. As the Court noted, the district court had express power to grant the injunction sought by the government pursuant to 26 U.S.C. § 7402(a). *Id.* In exercising its authority under the statute to issue a temporary injunction affecting the bank's assets at issue in the case, the district court in *First National* also looked to the significant public interest in preventing foreign taxpayers from evading the jurisdiction of United States courts by either transferring their assets abroad or by dissipating their assets in foreign accounts under control of American institutions. *Id.* Thus, in considering the correctness of the district court's "exercise of the equity power granted by 26 U.S.C. § 7402(a)," the Court found important the public interest involved: "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they

are accustomed to go when only private interests are involved." *Id.* at 383 (quoting *Virginian R. Co. v. System Fed'n*, 300 U.S. 515, 552 (1937)).

Conversely, Petitioner can claim neither federal statutory authority nor a strong public policy interest to support the court's seizure of Respondents' assets in this case. Rather, the receivership order was issued by the district court under the mistaken view that the Petitioner was likely entitled to a constructive trust under Georgia law. Pet. App. 66a-67a. In this contractual dispute between textile merchants, no matters of public concern have ever been raised or addressed. Thus, the injunction at issue in *First National*, which had been issued to the government pursuant to the court's authority under federal statute, and which was determined to be an appropriate measure to protect a matter of significant public interest, was granted under circumstances wholly at odds from the case here.

Petitioner also claims error in the court of appeals for its adoption of language from *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945) to support its decision. The court of appeals observed that the unlimited prejudgment seizure of the Respondents' assets, where Petitioner had an adequate remedy at law, would "create a precedent of sweeping effect." Pet. App. 30a. In *De Beers*, the preliminary injunction, which prevented the transfer of assets by the defendants, was granted by the district court to secure a potential money judgment in the event of a future finding of contempt. *De Beers*, 325 U.S. at 220. The Court held the temporary injunction under review was not proper because the relief it afforded was not of the same character,

and could not therefore preserve a remedy, that could be granted finally in the case.[7]

In considering the interlocutory relief granted to Petitioner, the court of appeals shared the concerns voiced by the Court in *De Beers*:

> To sustain the challenged order[s] would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence.

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[7] In accordance with the Court's teachings in *De Beers*, where the Court noted at the outset that "it will be well to note exactly what is the substance of the injunction, since the name given to the process is not determinative," 325 U.S. at 219, the court below examined the nature of the relief sought by Petitioner, and concluded that it was, in substance, a prejudgment attachment. Pet. App. 27a-29a.

Pet. App. 30a (quoting *De Beers*, 325 U.S. at 222-23). In view of the court of appeals' determination that the Petitioner was not entitled to a constructive trust under Georgia law, and that the Petitioner had not otherwise met the standards for a prejudgment attachment under Rule 64, the court of appeals' deference to the teachings of *De Beers* was not error.

In sum, the decision below is not inconsistent with this Court's prior decisions and further review by the Court is not warranted on that ground.

II. THERE IS NO CONFLICT AMONG THE FEDERAL COURTS OF APPEALS ON THE ISSUE PRESENTED BY THIS CASE

Petitioner urges a conflict among the federal courts of appeals which simply does not exist. For various reasons, each of which is discussed below, all of the federal courts of appeals' decisions relied upon by Petitioner are distinguishable from the decision below and do not demonstrate a split of authority warranting the Court's review. Indeed, none of these cases supports the broad rule of law urged by Petitioner that a federal district court has authority, either under Rule 65 of the Federal Rules of Civil Procedure, or under the All Writs Act, to sequester and place into a receivership all of a defendant's assets for the sole purpose of satisfying a possible future money judgment.

A. Unlike the Decisions Upon Which It Relies, Petitioner Did Not Meet the Requisites for Equitable Relief

An important factor in the court of appeals' analysis was the absence of irreparable harm and the existence of an adequate remedy at law. Pet. App. 23a-24a. As the Court

has recognized, "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959)).

Consistent with the decisions of this Court and with the opinion below, almost all of the other courts of appeals' decisions Petitioner contends are in conflict with the Eleventh Circuit have stressed the necessity of demonstrating irreparable harm prior to the granting of any preliminary equitable relief. *See Hughes Network Sys. v. Interdigital Comm. Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) (plaintiff must demonstrate irreparable harm to obtain preliminary injunctive relief); *Gerardi v. Pelullo*, 16 F.3d 1363, 1373 (3d Cir. 1994) (plaintiff must demonstrate irreparable harm to obtain preliminary injunctive relief); *Unisys Corp. v. Dataware Prods., Inc.*, 848 F.2d 311, 314 (1st Cir. 1988) (where court held "there has been a sufficient showing of irreparable harm to Unisys as well as a balance of harms in favor of Unisys"); *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986) (plaintiff must demonstrate irreparable harm to obtain preliminary injunctive relief); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 51 (1st Cir. 1986) (a showing of irreparable harm is a prerequisite to the granting of preliminary injunctive relief); *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (plaintiff must demonstrate both irreparable harm and the absence of an adequate remedy at law prior to obtaining a preliminary injunction; "[t]he absence of an adequate remedy at law is a precondition to any form of equitable relief.").

The decision below is not inconsistent with the principles of equity cited by the other courts of appeals. In reaching for relief in this Court, Petitioner, unfortunately, has

overstated what the court of appeals "held": that which Petitioner refers to as the erroneous "general federal rule of equity" purportedly announced by the court below. But Petitioner has failed to present the court of appeals' statement in its entirety. Pet. 7. In finding no legal basis for the receivership order here, the court of appeals did not speak in absolutes; it merely observed that: "*Ordinarily*, 'the general federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment.'" Pet. App. 26a (quoting *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988)) (emphasis supplied). This observation is entirely consistent with the other circuits on this issue and does not present the conflict espoused by Petitioner. *See, e.g.*, *Foxboro Co. v. Arabian Am. Oil Co.*, 805 F.2d 34, 36 (1st Cir. 1986) (irreparable injury does not exist "where only money is at stake and where the plaintiff has a satisfactory remedy at law to recover the money at issue.");[8] *Hughes Network Systems*, 17 F.3d at 693-94 (although "extraordinary circumstances" may demonstrate irreparable harm even where money damages are sought, a preliminary injunction will normally not be granted "where the harm suffered may be remedied by money damages at judgment."); *In re Feit & Drexler, Inc.*, 760 F.2d 406, 416 (2d Cir. 1985) ("As a general rule, of course, a party may not obtain injunctive

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[8] Notably, *Foxboro* was decided *after* the First Circuit's decision in *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986), a case relied upon by the Petitioner as evidencing a split of authority among the federal courts of appeals. The court in *Foxboro* vacated the preliminary injunction because the plaintiff had failed to demonstrate irreparable harm. *Foxboro*, 805 F.2d at 35.

relief where it is claiming a loss that can be adequately remedied by an award of money damages.").

The court of appeals simply did not, as Petitioner contends, announce a broad-sweeping general federal rule of equity that a court may never impose restraints upon a defendant's assets *pendente lite* in order to secure those assets to satisfy a possible money judgment. Rather, the court of appeals stated that "ordinarily" a court may not freeze assets for those purposes, and held that, in this case, there was no extraordinary basis for such preliminary equitable relief. Pet. App. 26a.

B. Decisions Upholding Interim Equitable Relief Granted Pursuant to Authority Under Federal Statute are not Comparable to the Decision Below

Several of the cases relied upon by Petitioner as being inconsistent with the decision below are also inapposite as the interlocutory injunctive relief accorded was deemed available pursuant to federal statute.

For example, in *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986), the court reviewed an injunctive decree requiring the liquidating defendant corporation to hold a portion of a fund already set up for creditors' claims to satisfy any award entered in a pending arbitration under the Federal Arbitration Act, 9 U.S.C. § 1-16 (1970 & Supp. 1994) ("FAA"). The court relied upon the announced congressional desire to "enforce" arbitration agreements under the FAA as authority in the district court for entry of the challenged decree. Thus, as in *Deckert*, the court of appeals found the power to "enforce" a remedy under a federal statute to carry the power to enter preliminary

injunctive relief to protect a fund established for the precise purpose of protecting defendant's creditors.

Similarly, in *In re Feit & Drexler, Inc.*, 760 F.2d 406 (2d Cir. 1985), federal statutory authority supported the decree. There, the injunction at issue was granted in accordance with the bankruptcy court's express powers under the Bankruptcy Code, virtually identical to the injunctive provision identified by this Court in *First National*. Also, in *Foltz v. U.S. News & World Report*, 760 F.2d 1300 (D.C. Cir. 1985), a narrowly drawn injunctive decree was deemed within the authority of the district court to avoid "[i]rrevocable loss" of a congressionally created cause of action against a pension plan by plan participants under the Employment Retirement Income Security Act ("ERISA"). 760 F.2d at 1308. The court there noted that it was embracing "an equitable remedy designed to freeze the *status quo*, as opposed to creating a pool of resources from which [plaintiffs] could draw prior to a determination of liability," *id.* at 1309, while the parties sorted out "novel questions in the labyrinthine complexities of ERISA law and practice." *Id.* at 1308.

Again, in *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327 (4th Cir. 1989), the disputed injunctive decree was obtained *by the government* in an action for equitable relief and damages under the False Claims Act, 31 U.S.C. § 3729, where the enjoined party, the subject of a highly leveraged buyout, was involved in a self-liquidation. The court found the situation "more closely aligned" with that in *Deckert* and *First National* and upheld the district court's action.[9] *Id.* at 1330.

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[9] In a footnote, the court in *Singer* does, we believe, go beyond the limited holdings in *Deckert* and *First National* to (continued...)

And finally, in *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir. 1984), the court of appeals was faced with the district court's grant of a preliminary injunction enjoining the revocation of a distributorship agreement pursuant to the authority of a federal statute, Section 3 of the Clayton Act, 15 U.S.C. § 14. *Id.* at 381. The court of appeals after discussing, in *dicta*, the requisites for a preliminary injunction, *reversed* the lower court's preliminary injunction as improvident. *Id.* at 395.

Therefore, the decisions of the First, Second, Fourth, Seventh, and District of Columbia Circuit Courts of Appeals relied upon by Petitioner to show a split of authority are not comparable to the court of appeals' decision here and do not stand for the general proposition that a district court may freeze a defendant's assets in order to preserve a fund for payment of a money judgment in the event the plaintiff succeeds on its claims under state law.[10]

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[9](...continued)
find in them "approval of the exercise of general equitable power to protect a plaintiff's right to recovery." *Singer*, 889 F.2d at 1330 n.15.

[10] Other cases relied upon by Petitioner do not aid its position as they involve the issuance of provisional injunctive decrees to preserve specific assets subject to ultimate injunctive relief in the case, not, as the situation here, to preserve a fund from which an inchoate money judgment may be satisfied. In *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220 (8th Cir. 1987), for example, the district court's authority to issue a preliminary injunction order designed to preserve a stock of fraudulently obtained airline tickets was upheld by the court of appeals as plaintiff's "only true
(continued...)

C. The Interlocutory Equitable Relief in This Case Did Not Involve Matters of Significant Public Interest

As stated by this Court in *First National*, courts "may, and frequently do, go much farther" in granting preliminary injunctive relief where a public interest is at stake. 379 U.S. at 383. In this vein, at least two of the cases relied upon by the Petitioner to show a conflict among the circuits do not aid Petitioner's cause. These cases, rather than embrace the broad equitable doctrine Petitioner espouses, are colored by the overriding public interest in the decision to grant the injunctive relief.

In *Tri-State Generation v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986), the plaintiff sought preliminary and permanent injunctive relief to enjoin a transaction among public utilities threatening the viability of the whole REA system of utilities. 805 F.2d at 354, 356. The plaintiff appealed the district court's dissolution of a consensual preliminary injunction. The narrow issue before the court of appeals was whether the lower court abused its discretion in dissolving the provisional relief. *Id.* at 354. A significant part of the equation in the court's analysis was the "broad public interest" favoring the plaintiff's position. *Id.*

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[10](...continued)
recourse is to recover the outstanding [airline] tickets." 825 F.2d at 1226-27. No pronouncement of general federal equity precepts at odds with the decision below was issued by the court in *Airlines Reporting Corp.*; rather, the court found the plaintiff had no adequate remedy at law and that the preliminary injunction was proper "in the circumstances of this case." *Id.* at 1227.

at 358. Indeed, the court concluded that the public interest "favor[ed] issuance of the injunction." *Id.* at 360.

In addition to its reliance upon federal statute as noted above, the court in *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327 (4th Cir. 1989), also found the public interest in deterring "exploitation of the public fisc" a factor in holding that the district court did not abuse its discretion in granting the preliminary injunction. *Id.* at 1335.

As the decisions of the Tenth Circuit in *Tri-State* and the Fourth Circuit in *Singer* were decided with significant public interests in mind, these cases are readily distinguishable and do not demonstrate a division of authority among the lower federal courts.

D. The Preliminary Injunctions Sustained by Other Courts Have Been Narrowly Tailored To Preserve the Final Remedy

The Petitioner's reliance on *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990) is also misplaced. While the *Hoxworth* court made several sweeping pronouncements with which the court below indicated disagreement, those pronouncements were *dicta* as the *Hoxworth* court *vacated* the preliminary injunction at issue as "fatally overbroad." *Hoxworth*, 903 F.2d at 208, 211. The court in *Hoxworth* emphasized that "just because a district court enjoys the power to protect a potential future damages remedy with a preliminary injunction does not mean that such an injunction is appropriate in a run-of-the-mill damages action." *Id.* at 197. *See also Hughes Network Sys. v. Interdigital Comm. Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) ("Where the harm suffered by the moving party may be compensated by an award of money damages at judgment,

courts generally have refused to find that harm irreparable.").

Notably, the overbroad preliminary injunction in *Hoxworth*, which was vacated on appeal, was far narrower than the sweeping interlocutory equitable relief here. In *Hoxworth*, the district court merely prohibited the defendants "from transferring any funds outside the ordinary course of business and from transferring any funds outside the country without prior approval by the district court." *Hoxworth*, 903 F.2d at 189. Likewise, in *Unisys Corp. v. Dataware Products, Inc.*, 848 F.2d 311 (1st Cir. 1988), the preliminary injunction prohibited the defendants "from transferring any assets or stock other than in the ordinary course of business." *Unisys Corp.*, 848 F.2d at 313. As noted by the Fourth Circuit in *Hughes Network Systems*, in those cases where preliminary injunctions have been issued to preserve a potential award for money damages, the preliminary injunctions have been "carefully tailored." 17 F.3d at 694.

In this case, by contrast, the comprehensive receivership order effected attachment of *all* of the Respondents' assets. The restraint on those assets was not limited to transactions outside of the Respondents' ordinary course of business, as in *Hoxworth* and *Unisys Corp.*, but rather, the court stripped the Respondents of *any* control over *any* assets whether inside or outside the ordinary course of business. Pet. App. 80a-89a.

III. THIS CASE DOES NOT PRESENT AN IMPORTANT AND RECURRING QUESTION OF FEDERAL LAW

This case, which involves interlocutory relief in a private commercial dispute between merchants over the sale of textile yarn, presents no important or recurring questions warranting the Court's further review.

In applying the Georgia law invoked by Petitioner, the court of appeals found that the Petitioner was not entitled to the imposition of any constructive trust under the facts of this case. In finding no ultimate equitable remedy available to support interim equitable relief, the court of appeals also stated that "*ordinarily*" a court may not seize a defendant's assets in order to satisfy a potential future money judgment for damages. Pet. App. 26a (emphasis supplied). It is this observation which, although entirely consistent with the prior decisions of this Court, as well as the decisions of the other federal courts of appeals, Petitioner posits is an important question mandating this Court's review. The Petitioner is wrong.

Certiorari is restricted to those "cases involving principles the settlement of which is of importance to the public, *as distinguished from that of the parties.*" *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) (on dismissal of writ of certiorari) (emphasis supplied). There are no public concerns at stake in the district court's interlocutory rulings in this private, contractual dispute. In fact, the only interest at stake in this appeal is the payment of Respondents' attorneys' fees. Further review by the Court is not warranted.

Moreover, the question presented by this case, as opposed to the one urged upon the Court by the Petitioner, is not a recurring one. The issue posed by Petitioner below and addressed by the court of appeals -- whether the district court erred by allowing for the payment of Respondents' attorneys' fees out of receivership assets and by exempting those payments from the operation of any constructive trust that might imposed on final judgment -- was not discussed in any of the decisions purported by Petitioner to be in conflict with the Eleventh Circuit. Nor is this the issue now presented by the Petitioner to this Court.

The federal procedural issues also do not merit review by this Court as the court of appeals correctly determined Petitioner could not claim relief under the Federal Rules of Civil Procedure or the All Writs Act.

The court of appeals examined all possible bases to uphold the district court's receivership order, including Federal Rule 64, and found that Petitioner could not meet the standard embodied in the Rule. In footnote 24 to the opinion below, the court of appeals stated that the district court was "not authorized under Rule 65 to attempt to accomplish" what it otherwise could not do under Rule 64 and observed that the Third Circuit in *Hoxworth* disagreed. Pet. App. 27a-28a. The court below made too much of the appearance of a conflict with the Third Circuit on this point, inasmuch as the court in *Hoxworth expressly declined* to decide whether the injunction at issue was in fact a prejudgment attachment. *Hoxworth*, 903 F.2d at 195 n.14.[11] As noted above, Petitioner has elevated this

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[11] Because the parties had not raised the issue, the court in *Hoxworth* found it had "no occasion" to address whether

(continued...)

footnoted point to the crux of its petition. But the court of appeals was correct in concluding that Petitioner may not accomplish under Rule 65 what it otherwise may not lawfully accomplish under Rule 64. To allow Petitioner to do so would render Rule 64 meaningless. In analogous circumstances, this Court has expressed "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Freytag v. C.I.R.*, 501 U.S. 868, __, 111 S.Ct. 2631, 2638 (1991) (quoting *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 562 (1990)).[12] Thus, the Petitioner is simply incorrect in its assertion that an important and recurring question arises from the court of appeals' determination that the prejudgment seizure of Respondents' assets should be allowed under Rule 65 when Petitioner admittedly cannot meet the requirements of Rule 64.

Petitioner's reliance upon the All Writs Act, 28 U.S.C. § 1651 (1988) is also misplaced.

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[11](...continued)
the injunction there was in fact a prejudgment attachment subject to Rule 64. 903 F.2d at 195 n.14.

[12] This reasoning is consistent also with the mandate of Rule 66, which governs receivers appointed by federal courts, that all actions in which a receiver is sought are governed by the Federal Rules.

Moreover, Petitioner's assertion in this Court for the first time that Rule 65 provides "authority" for a prejudgment attachment of assets confronts the serious issue of whether the construction of Rule 65 urged by Petitioner would violate the Rules Enabling Act, 28 U.S.C. § 2072(b), which provides in part that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right."

The court of appeals correctly summarily disposed of any contention that the All Writs Act might supply authority for the granting of the preliminary equitable relief here. Pet. App. 18a-19a. The court, citing *Pennsylvania Bureau of Corrections v. U.S. Marshals Serv.*, 474 U.S. 34 (1985), observed that the All Writs Act provides the district court with "incidental" authority to issue only those writs necessary for preserving subject matter jurisdiction. Pet. App. 18a.

By invoking the All Writs Act as a basis for the preliminary equitable relief provided by the district court below, the Petitioner submits that the All Writs Act authorizes the court to do what it otherwise could not do under the Federal Rules. Preliminary injunctive relief was not available because the Petitioner had no right to a constructive trust and could not show irreparable injury. A prejudgment attachment was not proper under Rule 64 because Petitioner had no basis for such a remedy. As a result, the Petitioner urges that a district court has authority under the All Writs Act to order sequestration of a defendants' assets for the purpose of protecting a possible money judgment.

This Court has held that the All Writs Act may not be distorted to such purposes:

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling. Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with

statutory procedures appears inconvenient or less appropriate.

Pennsylvania Bureau of Corrections, 474 U.S. at 43. There simply is no support for Petitioner's assertion that it may effect an otherwise unavailable prejudgment attachment of Respondents' assets pursuant to the All Writs Act.

Thus, the decision below does not present a recurring question meriting the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Michael K. Wolensky
(Counsel of Record)
Sarah E. Day

KUTAK ROCK
4400 Georgia-Pacific Center
133 Peachtree Street, N.E.
Atlanta, GA 30303
(404) 222-4600

Counsel for Respondents General Sales & Leasing Company, Classic Sales, and Robert E. Lee

August 1994

APPENDIX

[Filed Dec. 9, 1992]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 1:91-CV-1510-MHS

MITSUBISHI INTERNATIONAL CORPORATION,

Plaintiff,

v.

CARDINAL TEXTILE SALES, INC., et al.,

Defendants.

ORDER

This matter is before the Court on a number of motions, most of which involve discovery disputes between the parties.

This matter has produced nearly one thousand pleadings and has imposed an unusual burden on the Court's resources.

To promote the efficient resolution of this matter, the Court will no longer grant extensions of time in this action, even by consent of the parties, and will grant no further hearings or conferences. Likewise, the Court will entertain no motions filed after February 1, 1993. As of January 1, 1993, the Court will no longer permit the payment of attorneys' fees from the funds held in receivership in this action and directs the Receiver accordingly; the issue of attorneys' fees will be resolved after trial. The trial date for this case, originally set for January 25, 1993, has been rescheduled for April 5, 1993, because of the Court's heavy criminal docket.

Furthermore, counsel for the parties in this matter have been unreasonably inclined to dispute discovery issues. While trial courts have broad discretion to control discovery, they also have a duty, especially in complex cases, to limit discovery to protect parties and witnesses from annoyance and excessive expense. National Independent Theatre Exhibitors, Inc. v. Buena Vista Distributing Co., 748 F.2d 602, 609 (11th Cir. 1984), cert. denied, 471 U.S. 1056 (1985); Doglow v. Anderson, 53 F.R.D. 661 (E.D.N.Y. 1971). Further, attorneys have an affirmative duty to conduct pretrial discovery in a responsible manner that is consistent with the spirit of the federal discovery rules and may be sanctioned for their failure to do so. See Fed. R. Civ. P. 26(g), 37; N.D. Ga. R. 225-4. Toward these ends, the Court directs the parties to complete all discovery by January 15, 1993, including discovery outside the Court's supervision. The Court reminds counsel of their duty under Rule 26(g), of the possibility of sanctions, and of the Court's reluctance to involve itself in discovery disputes between counsel.

The Court now summarizes its rulings on the motions before it:

1. For the reasons well stated in plaintiff's motion and reply brief, the Court GRANTS plaintiff's motion to submit additional interrogatories to defendant General Sales & Leasing Co. ("General Sales") [#623-1]. The interrogatories seek facts relevant to this action and are reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1).

2. The Court DENIES plaintiff's motion for protective order to prevent the deposition of Mr. Kondo [#746-1] by defendant ConAgra, Inc. ("ConAgra"). See Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979). The Court, however, directs ConAgra to pay Mr. Kondo's personal expenses incurred in taking his deposition. American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 448 (W.D. Mo. 1976).

3. The Court DENIES plaintiff's motion for protective order to prevent the deposition of Mr. Koyama [#745-1] by ConAgra. See Salter, 593 F.2d at 651. The Court, however, directs ConAgra to pay Mr. Koyama's personal expenses incurred in taking his deposition. American Standard, 71 F.R.D. at 448.

4. The Court GRANTS plaintiff's motion for protective order to prevent the deposition of Mr. Saito [#756-1] by ConAgra. Mr. Saito is a nontestifying expert, and ConAgra has not shown exceptional circumstances warranting his deposition. Fed. R. Civ. P. 24(b)(4)(B); see In re Shell Oil Refinery, 132 F.R.D. 437, 442 (E.D. La. 1990); see also 8 Wright & Miller, Federal Practice & Procedure § 2032, at 256.

5. To avoid the necessity of future repetitive litigation, and because none of the parties will be prejudiced, the Court GRANTS plaintiff's motion to amend its

complaint [#802-1]. See Scott v. Crescent Tool Co., 306 F. Supp. 884, 887 (N.D. Ga. 1969).

6. For the reasons well stated in plaintiff's motion and reply brief, the Court GRANTS plaintiff's motion to compel responses to discovery served on ConAgra [#814-1]. The documents sought are relevant to this action and reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1), 37(a).

7. The Court GRANTS plaintiff's motion for a protective order to prevent the fifth deposition of Mr. Noma [#827-1] by ConAgra. ConAgra has obtained a significant amount of discovery as to Mr. Noma and has not shown how further discovery would be helpful. See Avirgan v. Hull, 932 F.2d 1572, 1580 (11th Cir. 1991), cert. denied, 112 S. Ct. 913 (1992).

8. After an in camera inspection of the documents withheld from ConAgra by the Federal Bureau of Investigation ("FBI") and for the reasons stated in the Government's motion and response, the Court GRANTS IN PART and DENIES IN PART the FBI's motion to quash subpoenas served by ConAgra or alternatively for a protective order [#652-1]. The Court directs the FBI to produce the documents it has produced for plaintiff, those produced by plaintiff, and the documents seized from Ms. Mary Ellen Lee, but grants the FBI's motion for a protective order as to all other documents. See In re Application of Eisenberg, 654 F.2d 1107, 1113 (5th Cir. Unit B Sept. 1981); Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962), cert. denied, 371 U.S. 955 (1962).

9. The Court DENIES ConAgra's motion to compel plaintiff to answer interrogatories [#730-1]. The Court finds that plaintiff has satisfactorily answered the interrogatories at issue and that plaintiff has satisfied its burden of production under Rule 33(c). Fed. R. Civ. P. 33(c), 37(a); see Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 44 (S.D.N.Y. 1985).

10. The Court DENIES ConAgra's motion to compel plaintiff to produce documents (filed August 25, 1992) [#786-1]. The Court finds that the discovery sought is unreasonably cumulative and that ConAgra has had ample opportunity to discover the information sought. Fed. R. Civ. P. 26(b)(1).

11. The Court DENIES ConAgra's motion to compel the deposition testimony of James Brumm [#834-1] on the grounds of attorney-client and work product privileges. Fed. R. Civ. P. 26(b)(3); see Shelton v. American Motors Corp., 805 F.2d 1323, 1328 (8th Cir. 1986); In re Federal Grand Jury Proceedings, 938 F.2d 1578, 1582 (11th Cir. 1991). While the attorney-client privilege does not protect underlying facts from discovery, it does protect communications between attorney and client. Id.

12. The Court DENIES ConAgra's motion to compel plaintiff to produce documents (filed October 6, 1992) [#861-1]. The Court concludes that the documents sought by Request No. 14 are protected by the attorney-client and work product privileges and that, as to those documents protected by the work product privilege, ConAgra has not shown that it cannot obtain the substantial equivalent of these materials by other means. Fed. R. Civ. P. 26(b)(3). The Court also

concludes that Request No. 15 is overly broad and that ConAgra has not justified why the last ten years of purchase orders relating to any product in any of plaintiff's divisions would be relevant to this action, especially when plaintiff has already produced voluminous documents. Fed. R. Civ. P. 26(b)(1).

13. The Court DENIES AS MOOT ConAgra's motion for an extension of time within which to respond to plaintiff's motion to compel responses to discovery.

14. The Court DENIES the motion of defendants Cardinal Textile Sales, Inc., United General Marketing, Inc., and Charles W. Jones individually and d/b/a Consolidated Trading Co. to compel a response to a deposition question [#833-1]. The Court concludes that the information sought concerns communications between an in-house attorney and his corporate clients, that these communications are protected by the attorney-client privilege, and that corporations can invoke the privilege. Upjohn Co. v. United States, 449 U.S. 383, 389-97 (1981); Moore v. Tri-City Hospital Authority, 118 F.R.D. 646, 648-49 (N.D. Ga. 1988).

15. The Court GRANTS plaintiff's second motion to submit additional interrogatories to General Sales [#865-1]. The interrogatories seek relevant facts and are reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1).

16. The Court GRANTS plaintiff's motion to determine the sufficiency of answers to plaintiff's second request for admissions [#866-1]. The Court finds General Sales' answers to be insufficient and directs General Sales to respond fully within ten days of the date of this order or the matters at issue will be deemed admitted and

General Sales will be charged with plaintiff's reasonable attorneys' fees incurred in proving these matters. Fed. R. Civ. P. 37(c).

17. The Court GRANTS plaintiff's motion to compel responses to discovery served on ConAgra [#876-1]. The documents requested are relevant to this action and reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1).

18. After consideration of the motions, responses, and replies of the Receiver, Fidelity Savings Bank ("Fidelity"), and the parties, the Court GRANTS the Receiver's motion to compel Fidelity to pay certain funds held on behalf of Robert E. Lee into the registry of the Court [#557-1]. The Court's Receivership Order stated that

> all creditors and other persons seeking money damages or other relief from any Receiver Entities . . . are hereby stayed and restrained from doing anything to interfere with the possession, recovery, or management by the Receiver of the property and assets owned, controlled, belonging to, or in the possession of any of the Receiver Entities or to interfere with the Receiver in any manner during the pendency of this proceeding.

Receivership Order of August 22, 1991, at 7. The funds at issue here must be protected to preserve the status quo, and placing them in the Court's registry does not decide the merits of various creditors' claims. See United States v. Arizona Fuels Corp., 739 F.2d 455 (9th Cir. 1984). Thus, the Court directs Fidelity

to pay into the registry the funds it holds as security for a letter of credit on behalf of defendant Robert E. Lee.

19. The Court GRANTS plaintiff's unopposed motion to determine the sufficiency of answers of the defendants Purvis-Sikkelee International, Ltd., Skein Dyers of America, Inc., William J. Purvis, and William L. Sikkelee ("PSI Group") to plaintiff's requests for admissions [#913-1]. The Court finds the PSI Group's answers insufficient and directs the PSI Group to truthfully admit or specifically deny each request within ten days of the date of this order or the matters at issue will be deemed admitted and the PSI Group will be charged with plaintiff's reasonable attorneys' fees incurred in proving these matters. Fed. R. Civ. P. 36, 37.

20. The Court GRANTS plaintiff's unopposed motion to submit two additional interrogatories to the PSI Group [#912-1]. The interrogatories seek facts relevant to this action and are reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1).

IT IS SO ORDERED, this 9th day of December, 1992.

/s/ Marvin H. Shoob
United States District Court
Northern District of Georgia

[Filed Aug. 28, 1991]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action File No. 1:91-CV-1510-MHS

MITSUBISHI INTERNATIONAL CORPORATION,

Plaintiff,

v.

CARDINAL TEXTILE SALES, INC., GENERAL SALES & LEASING CO., UNITED GENERAL MARKETING, INC., CLASSIC SALES, CONSOLIDATED TRADING CO., FIBERTEX TEXTILE SUPPLIES, INC., PURVIS-SIKKELEE INTERNATIONAL LTD., SKEIN DYERS OF AMERICA, INC., SUN-FIBRES, INC., RAYMOND B. LIPPINCOTT, III, MARY ELLEN LEE, CHARLES W. JONES, ROBERT E. LEE, WILLIAM J. PURVIS, WILLIAM L. SIKKELEE AND JOSEPH L. SMITH,

Defendants.

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Mitsubishi International Corporation ("MIC") hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the pretrial Order of the Court dated August 22, 1991. MIC appeals from the portion of the Order which (i) authorizes payment of attorneys' fees to counsel for certain defendants, (ii) releases funds paid to these attorneys from "any restraint or constructive trust," and (iii) forbids MIC from seeking disgorgement, repayment, or a refund of those released funds at any time.

This 28th day of August, 1991.

Respectfully submitted,

/s/ Dorothy Y. Kirkley
PAUL, HASTINGS, JANOFSKY & WALKER
Ga. Bar No. 423800

4200 Georgia-Pacific Center /s/ James A. Orr
133 Peachtree Street, NE
Ga. Bar No. 554608

Atlanta, GA 30303
404/588-9900

Counsel for Mitsubishi International Corp.

(3)

Supreme Court, U.S.
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No. 94-2

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MITSUBISHI INTERNATIONAL CORPORATION,
Petitioner,

v.

CARDINAL TEXTILE SALES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

TIMOTHY B. DYK
(Counsel of Record)
BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

DOROTHY Y. KIRKLEY
JONES, DAY, REAVIS & POGUE
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 521-3939
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-2

MITSUBISHI INTERNATIONAL CORPORATION,
Petitioner,

v.

CARDINAL TEXTILE SALES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondents do not, and cannot, reconcile the decision below with the decisions of this Court and now eight Courts of Appeals holding that district courts have the authority under federal law to freeze defendants' assets to protect a money judgment. Respondents concede, as they must, that the Court of Appeals understood its decision in this case to conflict with the decisions of other Circuits. Opp. 24; *see* Pet. App. 28a. In fact, the Ninth and Eleventh Circuits have since cited this very decision as conflicting with the decisions of "[m]ost of the circuits." *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1478-80 (9th Cir. 1994); *see also Rosen v. Cascade Int'l, Inc.*, 21 F.3d 1520, 1528-29 (11th Cir. 1994). Only the Fifth Circuit has agreed with the Eleventh Circuit on this question. *In re Fredeman Litig.*, 843 F.2d 821, 824 (5th Cir. 1988).

In an attempt to persuade the Court that no conflict exists—notwithstanding the contrary conclusions of the Ninth and Eleventh Circuits—respondents posit various supposed distinctions between this case and the conflicting cases: that those cases arose under particular federal statutes; that those cases involved harm that was more irreparable or a public interest that was more compelling; that the injunctions in those cases were narrower. But none of these supposed distinctions was even mentioned, much less relied upon, by the Court of Appeals.[1] Instead, the Eleventh Circuit held that the district court was without authority to freeze respondents' assets because a "general federal rule of equity" bars such relief in *any* case seeking solely a money judgment. Pet. App. 26a. (quoting *Fredeman*, 843 F.2d at 824, and citing *De Beers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212 (1945)). This is the precise issue that "[m]ost of the circuits" have decided to the contrary. *Hilao*, 25 F.3d at 1478. Both the extent of the conflict on this question, and the need for this Court to resolve it, could not be clearer.

1. Only respondents dispute that the Eleventh Circuit's decision in this case conflicts with the decisions of other Circuits. The Eleventh Circuit acknowledged below that "[s]ome federal courts have held to the contrary" on this issue, citing the Third Circuit's decision in *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186 (3d Cir. 1990). Pet. App. 28a n.24. Again in *Rosen*, the same court, speaking through the same judge, noted the conflict between the decision below and the decisions of the First and Third Circuits. 21 F.3d at 1528-29. The Ninth Circuit, too, has recognized this conflict. That court recently observed that "[m]ost of the circuits have held that a preliminary injunction is available in these circumstances,"

[1] Nor did respondents challenge the freeze of their assets in the Court of Appeals based on any such supposed distinctions. Respondents did, however, unsuccessfully advance many of these same distinctions in opposing Mitsubishi's stay application, which was granted by Justice Kennedy on June 1, 1994. Pet. App. 93a.

but that "[t]he Fifth and Eleventh Circuits have held to the contrary," citing the decision below as representing the Eleventh Circuit's position. *Hilao*, 25 F.3d at 1478-80.

2. Respondents contend (Opp. 17) that "[s]everal" of the conflicting Court of Appeals cases, as well as this Court's decisions in *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), and *United States v. First National City Bank*, 379 U.S. 378 (1965), are distinguishable because "the interlocutory injunctive relief accorded [in those cases] was deemed available pursuant to federal statute." Respondents are wrong.

A number of these cases did, of course, present federal statutory causes of action. But none of these cases involved a federal statute that expressly authorized preliminary injunctions freezing assets. For example, while respondents contend that *First National* is distinguishable because the district court was acting pursuant to 26 U.S.C. § 7402(a), that provision simply permits district courts to issue injunctions "necessary or appropriate for the enforcement of the internal revenue laws." It nowhere states, in so many words, that courts may issue preliminary injunctions to prevent defendants from dissipating assets. Section 7402(a) thus provides courts with no more explicit authority to freeze defendants' assets than is provided by the All Writs Act, 28 U.S.C. § 1651(a), which authorizes courts in all cases to issue injunctions "necessary or appropriate in aid of their respective jurisdictions."

The Eleventh Circuit did not even intimate that the "general federal rule of equity" underlying its decision in this case contains such statutory exceptions. Nor did the decisions of this Court or the Courts of Appeals affirming preliminary injunctions freezing assets rest on authority conferred by any particular federal statute. For example, the Court in *First National* did not rely on the terms of 26 U.S.C. § 7402(a) in concluding that a preliminary

injunction freezing assets was within "the authority of the District Court." 379 U.S. at 385. Instead, the Court emphasized that, in contrast to *De Beers* (where the only final relief sought was an injunction against violation of the antitrust laws), "there is here property which would be 'the subject of the provisions of any final decree in the cause.'" *Id.* (quoting *De Beers*, 325 U.S. at 220). The Court then cited, as supporting authority, its earlier decision in *Deckert*, a case that did not involve 26 U.S.C. § 7402(a).[2]

Similarly, in the decisions from other Circuits that upheld preliminary injunctions freezing defendants' assets, the courts did not rely on federal statutes. The courts instead based their decisions on general federal equitable principles, on this Court's decisions in *Deckert* and *First National*, and on appellate decisions in cases that upheld similar injunctions entered without express statutory authority.[3] Indeed, three Circuits have recognized the district courts' authority under Rule 65 to freeze defendants' assets even in cases that present solely state law claims.[4]

3. Respondents repeatedly quote out of context the Eleventh Circuit's statement that "[o]rdinarily, '[t]he gen-

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[2] As the Third Circuit has observed, while "[a]rguably, *First National* could be distinguished from *De Beers*" based on 26 U.S.C. § 7402(a), "*First National* chose not to distinguish *De Beers* on this ground." *Hoxworth*, 903 F.2d at 197 n.15.

[3] *See, e.g., Foltz v. U.S. News & World Report*, 760 F.2d 1300, 1309 (D.C. Cir. 1985) (invoking "the principles that undergird equity jurisprudence"); *In re Feit & Drexler*, 760 F.2d 406, 414, 416 (2d Cir. 1985) (citing *First National*); *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43, 53 (1st Cir. 1986) (citing *Deckert, Foltz* and *Roland Mach. Co. v. Dresser Indus., Inc.*, 479 F.2d 380, 386 (7th Cir. 1984)); *United States ex rel. Taxpayers Against Fraud v. Singer Co.*, 889 F.2d 1327, 1330-31 & n.15 (4th Cir. 1989) (citing *Deckert, First National, Teradyne* and *Roland*).

[4] *See Hughes Network Sys., Inc. v. Interdigital Communications Corp.*, 17 F.3d 691 (4th Cir. 1994); *Gerardi v. Pelullo*, 16 F.3d 1363 (3d Cir. 1994); *Unisys Corp. v. Dataware Prods., Inc.*, 848 F.2d 311, 314 (1st Cir. 1988).

eral federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment.' " Pet. App. 26a (quoting *Fredeman*, 843 F.2d at 842). They appear to suggest (*e.g.*, Opp. 9, 16, 17) that the Eleventh Circuit used the word "ordinarily" to qualify its holding that district courts are without authority under Rule 65 to freeze defendants' assets and, therefore, did not decide the broader question whether district courts possess such authority. But respondents' argument cannot withstand scrutiny. One need only read beyond the sentence in which "ordinarily" appears, or examine how that very sentence was used in *Rosen*, to conclude that respondents are mistaken.

The Court of Appeals made this statement during a discussion of Rule 64, which allows prejudgment attachments to the extent available under forum state law. The court was simply espousing the view that, except in the narrow circumstances where a state statute may allow it, defendants' assets cannot be frozen to protect a money judgment. If the court had meant anything more by its use of the word "ordinarily," the court would not have proceeded to declare unequivocally: "Where the state attachment statute does not authorize prejudgment attachment in a given case, a district court is not authorized under Rule 65 to attempt to accomplish the same result by issuing a preliminary injunction." Pet. App. 27a-28a n.24.

Rosen also confirms that the Eleventh Circuit did not intend to qualify its holding that Rule 65 does not permit district courts to freeze defendants' assets in money judgment cases. Speaking through the same judge who authored the opinion in this case, the *Rosen* court stated:

> [C]ases in which the remedy sought is the recovery of money damages do not fall within the jurisdiction of equity. Based upon this fundamental principle of equity jurisprudence, we have explained, " 'the gen-

> eral federal rule of equity is that a court may not reach a defendant's assets unrelated to the underlying litigation and freeze them so that they may be preserved to satisfy a potential money judgment.'" *Mitsubishi Int'l Corp. v. Cardinal Textile Sales*, 14 F.3d 1507, 1521 (11th Cir. 1994)) . . . .

21 F.3d at 1527 (footnote omitted). The word "ordinarily" does not even appear in the court's discussion of the holding of this case.

4. Respondents also assert (Opp. 14) that no conflict exists because the injunction in this case, unlike those in other cases, does not satisfy the traditional "requisites for equitable relief." More specifically, they contend that Mitsubishi has not demonstrated "irreparable harm" (Opp. 14) and that the injunction does not serve the "public interest" (Opp. 20). But the Eleventh Circuit did not address, much less base its decision on, whether either requirement was satisfied here. Nor did respondents challenge the freeze of their assets in the Court of Appeals on either "irreparable harm" on "public interest" grounds.

Having resolved in the negative the threshold question whether district courts have the power under Rule 65 to freeze defendants' assets in money judgment cases, *see* Pet. App. 27a-28a & n.24; Pet. App. 29a-30a,[5] the Eleventh Circuit did not consider the subsequent question whether the district court properly exercised that power in this particular case. The Eleventh Circuit thus did not dispute the district court's finding in this case of "a substantial threat that Mitsubishi will suffer irreparable injury if the injunction is not granted." Pet. App. 67a. Nor did the Eleventh Circuit dispute the district court's finding that "granting of a preliminary injunction will serve the public interest." *Id.*[6]

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[5] An examination of the Eleventh Circuit's opinion immediately reveals that respondents err in asserting (Opp. 5) that this federal issue received "only footnote treatment in the court below." *See* Pet. App. 27a-28a & n.24; Pet. App. 29a-30a.

[6] Neither of the cases that respondents seek to distinguish as involving a "significant public interest"—*Taxpayers Against Fraud*,

5. Respondents next attempt (Opp. 21-22) to distinguish several conflicting cases as involving more "narrowly tailored" injunctions. As noted above, however, the question whether a district court has the power to freeze defendants' assets in money judgment cases is distinct from the question whether a district court has exercised that power in an appropriately restrained manner. The Eleventh Circuit did not consider the breadth of the injunction in this case, having concluded that the district court had no authority to enter any injunction freezing respondents' assets, no matter how narrow or how broad it might be. Nor did respondents themselves ask the Court of Appeals to strike down the injunction as unduly broad.

In any event, the preliminary injunction here—which prevented respondents from dissipating assets that they had "received, directly or indirectly, as a result of yarn or fiber transactions involving Mitsubishi or Mitsubishi funds" (Pet. App. 88a)—was less expansive than those in conflicting cases. For example, the Second Circuit in *In re Feit & Drexler, Inc.*, 760 F.2d 406, 408 (2d Cir. 1985), affirmed an order that "preliminarily restrained [the defendant] from transferring or disposing of any of her property." And the Ninth Circuit in *Hilao*, 25 F.3d at 1480, affirmed a preliminary injunction against the

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889 F.2d 1327, and *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986)—holds that district courts' authority under Rule 65 to freeze a defendant's assets is limited to such cases. In any event, the public interest is at least as great in this case as in many of the conflicting cases from other Circuits, which likewise involve disputes among private parties arising out of their commercial dealings. *E.g.*, *Hoxworth*, 903 F.2d 186; *Airlines Reporting Corp. v. Barry*, 825 F.2d 1220 (8th Cir. 1987); *Teradyne*, 797 F.2d 43. Indeed, there is a significant public interest in holding respondents accountable for their roles in what the dissenting judge below termed "an elaborate scheme to defraud Mitsubishi." Pet. App. 33a.

dissipation of any of the $320 million of assets in the estate of former Philippine President Marcos.[7]

6. Respondents finally argue (Opp. 23) that this case "presents no important or recurring questions warranting the Court's further review." They are mistaken on both counts.

One cannot seriously dispute that the question whether district courts have the authority under federal law to freeze defendants' assets is a "recurring" one. It has arisen this year alone in the Third, Fourth, Ninth and Eleventh Circuits.[8] Almost all of the Courts of Appeals have confronted the question over the past decade. *See* Pet. 12-15 (citing cases). The question is now ripe for resolution by this Court.

The question is also one of considerable practical importance—not only to litigants, but also to the federal judiciary. According to the minority rule adopted by the Fifth and Eleventh Circuits, no matter how certain a district court may be that a defendant is dissipating assets that will be needed to satisfy an eventual money judgment, the court is powerless to stop the defendant from doing so. *See Hoxworth*, 903 F.2d at 194.

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[7] Respondents also attempt to conflate the issue of the district court's power to freeze their assets—the sole issue presented here—with the issue of the propriety of the district court's appointment of a receiver. But the two issues are legally, factually and temporally distinct. After the district court had issued its initial order freezing certain of respondents' assets, Mitsubishi undertook discovery to identify those assets. But Mitsubishi's discovery efforts were stymied by respondents' invocation of their Fifth Amendment privilege against self-incrimination. Pet. App. 63a-65a. It was only then that the district court decided that a receiver should be appointed to locate and preserve respondents' assets. Pet. App. 87a. Respondents' arguments relating to the receiver—arguments neither presented to nor addressed by the court below—are thus nothing more than a red herring.

[8] *See Hilao*, 25 F.3d at 1476-80; *Rosen*, 21 F.3d at 1528-29; *Hughes Network Sys.*, 17 F.3d at 694; *Gerardi*, 16 F.3d at 1373-74.

This is a particularly appropriate case in which to consider the district courts' authority under Rule 65 and the All Writs Act to protect potential money judgments. The issue was squarely decided by the Eleventh Circuit, which recognized the conflict among the Circuits. Moreover, given the stay granted in this case by Justice Kennedy (Pet. App. 93a), the issue has not been mooted by subsequent events in the lower courts. The time is ripe, therefore, for the Court to resolve this important and unsettled question of federal law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

TIMOTHY B. DYK
(Counsel of Record)
BARBARA MCDOWELL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

DOROTHY Y. KIRKLEY
JONES, DAY, REAVIS & POGUE
303 Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 521-3939

Counsel for Petitioner

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